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83-524

NO.

in the

Supreme Court

of the

United States

October Term, 1983

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC.,

Appellants,

vs.

COCONUT CREEK CABLE T.V., INC.; WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; and NORMAN RICHMAN,

Appellees.

On Appeal from the Fourth District Court of Appeal for the State of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Florida's cable television "access" statute relating to condominiums, Fla. Stat. Section 718.1232 (1981), which grants to private cable operators the right to install cable television lines over and through private property without provision for compensation, violates the Takings Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

Whether Fla. Stat. Section 718.1232 (1981), construed to allow ingress to private condominium property without the need for invitation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as applied to the facts of this case.

APPLICABILITY OF 28 U.S.C. §2403(b)

Pursuant to United States Supreme Court Rule 28.4.(c), Appellants state that 28 U.S.C. §2403(b) may be applicable to this case. Copies of this jurisdictional statement have been served upon the Attorney General for the State of Florida.

PARTIES TO THE PROCEEDING

Appellants, Defendants below, are: Wynmoor Limited Partnership and Wynmoor Community Council, Inc.

Appellee, Plaintiff below, is: Coconut Creek Cable T.V., Inc.

Other Appellees, which were Intervenors below, are: the Wynmoor Homeowners Association, Inc.; the

Martinique Village II-C Condominium Association, Inc.; and Norman Richman.

Wynmoor Limited Partnership and Wynmoor Community Council, Inc. hereby file this jurisdictional statement as Appellants in this proceeding, and state that:

This is the Appellants' original Designation of Corporate Relationships.

Wynmoor Limited Partnership is a New York limited partnership. Communications and Cable, Inc., a Delaware corporation, is both the general and a limited partner of Wynmoor Limited Partnership, and is a subsidiary of Cenville Development Corp., a Delaware corporation. Other limited partners are: McDonald Douglas Finance Corp., which is a subsidiary of McDonald Douglas Corp.; and CV Investments, Inc., a Florida corporation, which is a wholly-owned subsidiary of Cenville Development Corp.

Appellant, Wynmoor Community Council, Inc., is neither owned by any parent corporation, nor has any subsidiary or affiliate corporations.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision appealed by the Fourth District Court of Appeal for the State of Florida, entered June 29, 1983, 434 So.2d 903 (Fla. Dist. Ct. App. 1983), *App.* 17,[1]

[1] "*App.* _____" refers to the attached Appendix at page "_____".

and the opinion by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, which became final August 25, 1982, *App.* 1-14, are set out in the Appendix hereto. The Florida Supreme Court's decision dismissing Appellants' Petition for Review for lack of jurisdiction, entered July 26, 1983, is also set out in the Appendix, *App.* 15-16.

JURISDICTIONAL GROUNDS

Florida Statute §718.1232 (1981) (sometimes hereafter: "Statute") purports to prevent a condominium developer from denying access to or interfering with a private, franchised cable television operator's installation of cable television lines on condominum property, regardless of the developer's ownership interest in the property. The Statute makes no provision for compensation to be paid the landowner/developer in return for such statutorily mandated access.

The federal constitutional questions were timely raised by Appellants as defenses to an action initiated by Appellee, Coconut Creek Cable T.V., Inc. (hereafter: "Coconut Creek Cable"), which sought a declaration of Coconut Creek Cable's right to enter, and to lay cable within, a condominium community being developed by Appellant Wynmoor Limited Partnership (hereafter: "Developer"). These federal constitutional issues were raised throughout the Florida appellate proceedings leading to this appeal.

On July 9, 1982, the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida decided in favor of Plaintiff-Appellee Coconut Creek Cable. The court ruled that the Statute granted franchised cable television operators access to private property, and that such statutory grant was not in derogation of the Takings Clauses of either the Florida or Federal Constitutions. *App.* 8-9. This decision became final on August 25, 1982, upon denial of Appellants' Motion for Reconsideration.

On June 29, 1983, the Fourth District Court of Appeal for the State of Florida affirmed the Circuit Court's decision, *per curiam* without opinion. *App.* 17-18.

On July 26, 1983, the Florida Supreme Court determined that it lacked the jurisdiction to review the *per curiam* affirmance and indicated that a motion for rehearing would not be entertained. *App.* 15-16. *See Nash v. Florida Industrial Commission, et.al.*, 389 U.S. 235, 237 n.1 (1967); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

Notice of Appeal to this Court was timely filed with the Fourth District Court of Appeal on September 9, 1983. *App.* 19-21.

The appellate jurisdiction of the United States Supreme Court to review the decision of the Fourth District Court of Appeal for the State of Florida is conferred by 28 U.S.C., §1257(2). In addition, the following decisions sustain such appellate jurisdiction: *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____,

102 S.Ct. 3164 (1982); *Kaiser Aetna, et.al. v. United States*, 444 U.S. 164 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portion of the Fifth Amendment to the United States Constitution provides as follows:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V, cl. 3 *and* 4.

The pertinent portion of Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const., amend. XIV, §1.

The Florida Statute at issue here, Fla. Stat. §718.1232 (1981), provides as follows:

> No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide

such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Fla. Stat. §718.1232 (1981).

STATEMENT OF THE CASE

Appellant Developer, Wynmoor Limited Partnership, is in the process of developing a large planned unit development located in Coconut Creek, Florida. The development (hereafter: "Wynmoor" or "Wynmoor Village") is being built in stages, and presently includes a number of discrete areas; each owned and managed by a separate association of condominium unit owners. When completed, Wynmoor will consist of approximately seventeen condominium communities which, although operationally separate, will be linked by eventual common ownership of community-wide facilities and lands to be owned by a "master" association of all Wynmoor unit owners, Appellant Wynmoor Community Council, Inc. (hereafter: "Council").

Pending completion of the development, however, or as a result of conditions imposed by the various declarations of condominium, Appellant Developer presently retains ownership or control of certain lands and facilities within Wynmoor Village. The private internal roadways, large areas of undeveloped land, and all

unsold condominium units at Wynmoor, for example, are owned either by Appellant Developer or by Appellant Council. Access to the Wynmoor property is thus presently under Appellants' ownership or control.

Appellant Council, the master mandatory membership association of all Wynmoor condominium unit owners, is currently controlled by Appellant Developer. The Council's purpose and function is to hold title to some of Wynmoor Village's common facilities; to later receive title from Appellant Developer to certain additional lands and facilities, as the development progresses; and to manage and operate those Wynmoor Village facilities and properties which are beyond the confines, ownership, and control of the various discrete parcels submitted to the condominium form of ownership.

Appellees, Wynmoor Homeowners Association, Inc., Martinique Village II-C Condominium Association, Inc. and Norman Richman (hereafter collectively: "Intervenors") represent respectively, a voluntary "homeowners" association; one of the existing condominium associations, and a condominium unit owner.[2]

Appellee Coconut Creek Cable is the exclusive franchised cable television operator for the Coconut

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[2]Although granted Intervenor status, these Appellees were strictly limited in their ability to frame the issues litigated below. By orders of the trial court, Intervenors were aligned with Plaintiff-Appellee Coconut Creek Cable, and were barred from developing issues beyond those already framed by the pleadings. Thus, the further discussion below with respect to those federal issues raised between Appellants and Appellee Coconut Creek Cable were the only ones litigated, and accordingly are the only ones here on appeal.

Creek, Florida locality in which Wynmoor Village is being built. Prior to its institution of this litigation, Coconut Creek Cable had attempted to gain permission to access certain of the several condominium properties within the development. Such right-of-entry negotiations with individual condominium associations proved fruitless.

Shortly after passage of the Statute here at issue, by letter dated July 13, 1981, *App.* 22-23, Appellee Coconut Creek Cable notified Appellant Council that:

> Pursuant to Section 16, Chapter 718, Florida Statutes (the "Condominium Act") as amended June 25, 1981, and in accordance with [our] obligations under Local [Franchising] Ordinance Number 131-79 [our] representatives will begin installation of its cable within Wynmoor on July 17, 1981, at 8:30 a.m. All wires and cables will be laid underground unless there is a pre-existing powerline, and every effort will be made not to hinder unnecessarily or obstruct the free use of the streets, sidewalks, driveways within Wynmoor during the construction process.

The letter's cited amendment to the Florida Condominium Act is now codified as Fla.Stat.§718.1232 (1981). Arriving, as predicted, with men and equipment on the morning of the 17th, Appellant Council denied Coconut Creek Cable access to Wynmoor property.

A week later, on July 21, 1981, Appellee Coconut Creek Cable filed suit in the Circuit Court in and for Broward County, Florida seeking a judicial declaration of its right to access Wynmoor property under the Statute. Consistently with their letter's stated purpose, Appellee Coconut Creek Cable sought the following relief:

> Enter an Order permanently enjoining and restraining Defendants [Appellants here] . . . from violating or interfering with Plaintiff's [Coconut Creek Cable] legal and constitutional rights, as by denying Plaintiff access to the Wynmoor Village project and obstructing and preventing it from laying its transmission lines therein.

It was on the basis of this clearly-stated interpretation of the Statute that Coconut Creek Cable was denied entry to the Wynmoor property. Appellants then defended against the assertion of statutory access by raising the Statute's unconstitutionality as a taking of private property.

On July 9, 1982, the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida rendered judgment in favor of Appellee Coconut Creek Cable stating:

> The basic issue in this case is whether plaintiff in entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

App. 2, and holding:

> No matter who holds legal title to such [Wynmoor Village] roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor Condominium unit owners and residents, and those who service them, as well as for the use and benefit of the developer during the period of development. Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

App. 7. The trial court enforced this holding by the entry of a permanent injunction preventing the Defendant-Appellants from interfering with Appellee Coconut Creek Cable's ingress to the Wynmoor property, and the solicitation of Wynmoor residents' subscription to its cable services. *App.* 12.

In reaching this decision, the trial court responded to Appellants' constitutional taking arguments by stating:

> In this regard the Court takes special note of the recent decision of the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____, 50 U.S.L.W. 4998 (1982) decided June 30, 1982, upon which defendants rely. There the U.S. Supreme Court held that a New York statute which required an owner of an apartment building to permit the permanent placement of television cables upon his building in return for a one-time

> payment of $1.00 constituted a taking without just compensation. Such decision is not dispositive of the instant case or its issues and does not require the invalidation of §718.1232, Florida Statutes.

App. 8-9. Aware of the *Loretto* decision, the trial court purported to distinguish the case, found defendants' federal constitutional challenges to be "without merit", and granted Coconut Creek Cable the described relief. *App.* 9.

On June 29, 1983, the Fourth District Court of Appeal for the State of Florida affirmed the decision of the trial court, *per curiam* without opinion. *App.* 17-18.

On July 26, 1983, the Florida Supreme Court determined that it lacked the jurisdiction to review the *per curiam* affirmance and, accordingly, dismissed Appellants' Petition for Review. *App.* 15-16.

SUBSTANTIALITY OF THE QUESTION PRESENTED

The teachings of *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____, 102 S.Ct. 3164 (1982) ("*Loretto*"), and *Kaiser Aetna, et. al. v. United States*, 444 U.S. 164 (1979) ("*Kaiser Aetna*") are clear: a private landowner's right to exclude unwanted intrusions by the public is a property right of constitutional proportion deserving of protection and, if destroyed, of compensation.

In *Loretto*, a strikingly similar cable television "access" statute was declared by this Court to require

compensation under the Fifth and Fourteenth Amendments to the United States Constitution. *Loretto*, ____ U.S. ____, 102 S.Ct. at 3179. *Loretto* thus stands for the proposition that a governmentally authorized permanent physical occupation of private property, even if minor, cannot be constitutionally mandated absent just compensation. *Id.* 102 S.Ct. at 3177-78 n. 16. Both the trial court and Florida's Fourth District Court of Appeal were aware of the *Loretto* decision, yet each failed to apply its clear precepts. Only the Florida trial court dealt with the *Loretto* issue in detail, stating:

> The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232 F.S., pronounces no such specific mandate, but expressly announces as a public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus the decision of the Supreme Court in *Loretto* is distinguishable from the instant case, both factually and substantively, and does not require this Court either directly or by implication, to invalidate the Florida statute.

App. 9.

This purported distinction cannot stand in the face of *Loretto's* treatment of the New York statute there

at issue. Comparison of the two statutes reveals that the language in each is almost identical.[3] Both are prohibitory in approach. Neither statute "affirmatively" declares, as opined by the Florida trial court, that the landowner's property "shall be occupied permanently and physically by a stranger". Rather, both statutes operate by simply preventing such landowner from interfering with the installation of cable services; "mandated" installation is the implicit and necessary effect of both the New York and Florida statutes. The "approach" of both statutes is thus identical, the Florida trial court's opinion notwithstanding.

As to "subject matter", it is clear that both the New York and Florida statutes were intended to provide maximum "access" to cable television services, *Loretto*, ____ U.S. ____, 102 S.Ct. at 3170-71; in the words of the Florida court to grant "unfettered access to available cable television service." This concededly valid police power purpose is not, however, sufficient to validate the statute. Under the *Loretto* decision, since the character of the mandated invasion is a "permanent,

---

[3]The New York statute at issue in *Loretto* provided, in pertinent part:

> 1. No Landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, . . .
>
> b. demand or accept payment from any tenant . . . or from any cable television company in exchange [for permitting cable television services on or within his Property].

N.Y. Exec. Law §828 (McKinney Supp. 1982).

physical occupation", there is rather applied a traditional *per se* test. *Id.* 102 S.Ct. at 3175-76. The conclusive result of such test is the finding of a taking requiring compensation. *Id.* The two statutes are thus also identical in intent, purpose, and effect.

Florida's §718.1232, accordingly, is not materially distinguishable from the New York statute found constitutionally wanting in *Loretto.* Indeed, those valid distinctions as do exist between the two statutes were ignored by the Florida courts. The New York statute, for example, contained, in addition to the language quoted above, *see* n. 3, the following:

> 1. No Landlord shall
>
> > b. demand or accept payment . . . *in excess of any amount* which the [State Commission on Cable Television], shall, by regulation, *determine to be reasonable* . . .

N.Y.Exec.Law §828 (McKinney 1982) (emphasis supplied). The New York legislature, by contrast to the Florida legislature, thus expressly recognized the takings ramifications of the access rights they were granting. Notwithstanding, the *Loretto* Court remanded the case for determination of the constitutional sufficiency of the regulatory $1.00 fee which the New York Commission had declared presumptively reasonable under the New York statute. *Id.* 102 S.Ct. at 3170 *and* 3179.

Here, the Florida Statute fails to make even a token, yet insufficient attempt at compensation. The Florida Statute simply contains no such provision. It mimics the operative provisions of the New York statute,

but without any of its constitutional safeguards. In view of §718.1232's clear purpose, its effect to grant cable television access to private property, its ommission of even token compensation, and its breach of the clear tenets of *Loretto*, the Florida Statute here at issue cannot withstand even facial constitutional scrutiny. The purported distinctions offered by the Florida trial court must thus be unavailing, and cannot serve to save the Statute.

Nor are §718.1232's constitutional infirmities only facial. Under the specific facts of this case, the relief so far provided Appellee Coconut Creek Cable, and the trial court's construction of the Statute, §718.1232, as applied, transgresses the constitutional limits described in *Kaiser Aetna*, 444 U.S. 164 (1979). Under the permanent injunction entered below, the Statute has already been construed to extinguish a private landowner's right to exclude from his property uninvited members of the public. As stated by the Florida Circuit Court:

> Another contention advanced by defendants was that plaintiff failed to establish evidentially that large numbers of Wynmoor residents were actively seeking plaintiff's services. Without regard to the accuracy of defendants' characterizations of the evidence, the statute in question, §718.1232 F.S., does *not* require such a showing or impose such a burden upon the provider of cable television service. The heart of the statute is the right of the condominium dweller to have access to available licensed or franchised cable television service *without regard to any measure of the quantity of such persons who may or may not want to*

> *avail themselves of such access.* The evidence in this case discloses that the actions of the defendants have improperly denied that right of access.

App. 9-10 (emphasis supplied).

In so construing the Statute, the Circuit Court rendered it unnecessary for the private, franchised cable television operator to be even an invitee of a condominium unit owner in order to gain ingress to the Wynmoor Village community. This statutory construction of §718.1232 is in clear derogation of Appellant Developer's, and other condominium unit owners', rights to exclude any uninvited person from the private confines of the Wynmoor community.

These exclusionary rights arise, from the various condominium documents attendant the Wynmoor Village development. The documents, for example, grant easements of ingress and egress to all unit owners, their guests, and their invitees. This list is exclusive by implication, and thus logically requires that Appellee Coconut Creek Cable be at least an *invited* vendor in order to gain access to the Wynmoor property. This construction of the documents is physically reinforced by the wall which surrounds the Wynmoor communities, and the limited access to the property thereby afforded.

In spite of this, the Florida trial court held, as quoted above, that no invitation was necessary in Coconut Creek Cable's case. Rather, the Statute, by itself, was sufficient to anoint Plaintiff-Appellee with the requisite status. Aside the problems of statutory construction so

engendered, this partial extinction of the right to exclude, effects, as applied, an unconstitutional taking where, as here, there is a complete absence of compensation for the extinguished exclusionary right. *Cf. Kaiser Aetna*, 444 U.S. at 179-80.

In summary, neither the opinion of the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County, Florida, nor its affirmance by the Fourth District Court of Appeal, can be sustained in the face of either *Loretto* or *Kaiser Aetna*. The Florida court decisions thus merit swift and summary reversal by this Court.

CONCLUSION

The decisions below upholding Fla. Stat. §718.1232 (1981) and its governmental grant of rights to third party cable operators to permanently and physically occupy private property should be summarily reversed and remanded to the Fourth District Court of Appeal for the State of Florida for a decision not inconsistent with the tenets of the *Loretto* decision. Alternatively, this Appeal should be accorded plenary review.

Respectfully submitted,

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Appendix

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 81-14304 CL POLEN

COCONUT CREEK CABLE T.V., INC.,

Plaintiff,

vs.

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC.,

Defendants.

and

WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not-for-profit; and NORMAN RICHMAN,

Intervenors.

FINAL JUDGMENT AND DECREE

THIS CAUSE came on for trial before the Court on June 7, 1982 upon plaintiff's complaint for declaratory and injunctive relief. The Court received the testimony and documentary evidence presented by the parties on June 7 and 8. On the morning of June 9, 1982 counsel

for the parties made closing oral arguments. Pursuant to the request of the Court, the parties, through their counsel, on June 28, 1982 presented written post-trial briefs, the defendants having also submitted a brief prior to commencement of the trial.

The basic issue in this case is whether plaintiff is entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

Wynmoor Village (hereinafter "Wynmoor"), originally known as Rossmoor, is a large condominium project which has been and continues to be developed by the defendant, WYNMOOR LIMITED PARTNERSHIP. Wynmoor is located within the City of Coconut Creek, Florida. Presently it consists of approximately 3,500 completed and occupied condominium units, with another 1,500 to 2,000 units planned for the future. Plaintiff is a cable television company. Pursuant to Ordinance No. 131-79 of the City of Coconut Creek, plaintiff is franchised to operate throughout Coconut Creek and to serve all residential units located within that municipality. The validity of the franchise and its stated exclusivity are not issues for determination in this case. Intervenors consist of one resident of Wynmoor, one of the approximately 39 separate condominium associations established within Wynmoor, and a voluntary association of unit owners in Wynmoor. The defendant, WYNMOOR COMMUNITY COUNCIL, is an entity created by the condominium documentation to manage the recreational and other facilities common to all of the associations in the Wynmoor community. The COUNCIL itself is managed by a board of nine members, five of whom are

still appointed by the developer, but all owners of units at Wynmoor are non-voting members of the COUNCIL.

Plaintiff received its franchise on January 24, 1980. Thereafter it had proceeded to lay its cable to service all residential areas in Coconut Creek except Wynmoor. By letter dated July 15, 1981, addressed to the COMMUNITY COUNCIL, plaintiff announced its intent to enter Wynmoor to commence the process of designing and installing its cable television system to service customers within Wynmoor. Upon arrival at one of the only two entrance gates in the wall surrounding Wynmoor on July 17, 1981, plaintiff's representatives and equipment trucks were barred from entry. Defendants ultimately justified such act by claiming (1) that the roads in Wynmoor are private and under control of defendants and (2) that cable television is already exclusively provided to the residents of Wynmoor by Computer Cable T.V., Inc. a wholly-owned affiliate of WYNMOOR LIMITED PARTNERSHIP.

Upon being barred from the Wynmoor complex, plaintiff filed this action seeking a declaration of its right to enter Wynmoor and further seeking injunctive relief against defendants to prevent further interference by them with such right. Plaintiff premised its claim upon the common law, its franchise from Coconut Creek and Section 718.1232, Florida Statutes, which provides as follows:

> —No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident

> or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Defendants countered that the foregoing statute was unconstitutional, facially or as applied, in that it impaired existing contracts, denied equal protection and resulted in a taking of defendant's property without due process.

The intervenors essentially supported plaintiff's claim to a right of entry under the statute and contested the legality of the defendants' acts in denying such entry.

Plaintiff presented the testimony of two of its representatives, Arthur Bellis and Anthony Genova, concerning its activities to date in Coconut Creek under the franchise ordinance. Mr. Genova also testified in general as to the various methods and ways utilized by plaintiff in the past to reach private subscribers, including the use of utility easements in some instances.

Plaintiff also called, as an adverse party witness, Mr. James Coffey, president of WYNMOOR COMMUNITY COUNCIL and president of Computer Cable T.V. Mr. Coffey admitted that plaintiff was stopped at the Wynmoor entrance gate pursuant to his direction.

He further stated that in July 1981 no cable television service such as plaintiff offers was then available to Wynmoor residents. Under the contracts between Computer Cable and the Wynmoor residents, copies of which defendants offered into evidence, the unit owners receive a security alarm system and television service from a master antenna which provides all regular "off-the-air" television broadcast channels, such as NBC, CBS, ABC, WCIX, WPBT and the like, but which does not provide satellite television reception or programming such as it offered by HBO, Movie Channel, Cinemax, USA, ESPN, CNN, USA Channel or Showtime, i.e. entertainment and sports "pay TV" channels.

It is clear from the evidence that the referenced Computer Cable contracts do not encompass such satellite television service and that residents of Wynmoor have been expressing a desire to have such service available for at least two years prior to July 1981. Mr. Coffey testified that after this action commenced, and while it was pending, a representative of the WYNMOOR LIMITED PARTNERSHIP made arrangements with a company known as Earthstar Communications to offer such services to Wynmoor residents commencing in January 1982. In short, Earthstar was granted access as plaintiff was being denied access. As of the time of trial, Earthstar had signed up approximately 100 units in Wynmoor. Testimony from three Wynmoor residents confirmed their interest in having available the services offered by plaintiff.

Without attempting to recount herein all the relevant facts and evidentiary matter presented for the Court's consideration, the foregoing at least provides a setting

for the conclusions and orders which follow. Based upon the record in this cause, including the pleadings and all the evidence, testimonial and documentary, the Court finds and concludes as follows:

1. Plaintiff, as a licensed and franchised provider of cable television services, is clearly entitled under law to have entry into Wynmoor Village and to have full access to its various condominium associations and to their individual unit owners and residents. Plaintiff's right of entry and access is supported, *inter alia*, by its franchise from the City of Coconut Creek, of which Wynmoor is a part, and by the provisions of Section 718.1232, Florida Statutes. Only by allowing plaintiff entry into Wynmoor can the residents of that condominium complex have the access to plaintiff's services which the law and the statute authorize and guarantee.

2. Defendants' actions in barring plaintiff to date are without legal cause or justification and are, therefore, wrongful. Such actions must cease forthwith. Defendants, and their affiliates, through their officers, servants, agents, employees and representatives, should not in the future interfere with plaintiff's entry into Wynmoor or with plaintiff's reasonable efforts to design and plan the installation of its system at Wynmoor and to communicate with and solicit Wynmoor condominium associations and residents for service.

As a consequence, plaintiff is entitled to certain injunctive relief which is delineated more fully hereafter. Plaintiff has no adequate remedy at law and will suffer irreparable damage unless its right of entry or access

is not only declared but enforced and supported by said injunctions. Moreover, the Court cannot ignore the considerations for the public interest which exist in this case by virtue of the municipal franchise, the public policy enunciated in Section 718.1232, and the sizeable number of condominium dwellers affected.

a. At the trial, intervenors and defendants disputed who legally owned and controlled the roadway system in Wynmoor. The evidence upon that subject was also somewhat in dispute. This Court makes no finding upon that issue because none is required in this case. No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them, as well as for the use and benefit of the developer during the period of development. Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

b. The Court does not reach the constitutional issues raised by defendants because the facts of this case do not support such challenges to the validity of Section 718.1232, Florida Statutes.

(1) The defendants are not parties to the contracts between Computer Cable and the individual units. Besides, those contracts, and others to which the defendant, WYNMOOR LIMITED PARTNERSHIP, is a nominal party, do not cover the subject of satellite or "pay" television. Therefore,

there is no contract impairment in fact. In addition, the subject statute in no way mandates that a unit owner must use plaintiff's services, and there was no evidence presented that a unit owner would terminate his contract with Computer Cable even if he did.

(2) Section 718.1232 does not discriminate against the provision of cable television services by entities other than the plaintiff. It simply announces the policy of the state that condominium owners and residents shall have access to such services when the same are available, as is the case here.

(3) Nor does the subject statute either by its terms or under the facts existent in this case, constitute or result in a taking of defendants' property without due process or just compensation in any sense. As noted, nothing in the language of the statute mandates the use of plaintiff's services to the exclusion of any others or requires the abrogation of any valid and enforceable contracts.

In this regard the Court takes special note of the recent decision of the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, ___ U.S. ___, 50 LW 4998 (1982) decided June 30, 1982, upon which defendants rely. There the U.S. Supreme Court held that a New York statute which required the owner of an apartment building to permit the permanent placement of television cables upon his building in return for a one-time payment of $1 constituted a taking without just compensation. Such decision is not dispositive of

the instant case or its issues and does not require an invalidation of Section 718.1232, Florida Statutes.

The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232, F.S., pronounces no such specific mandate, but expressly announces as public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus, the decision of the U.S. Supreme Court in *Loretto* is distinguishable from the instant case, both factually and substantively, and does not require this Court, either directly or by implication, to invalidate the Florida Statute.

In sum, with or without the lessons of *Loretto*, the Court finds that the constitutional challenges of defendants to Section 718.1232, F.S., are without merit, especially since the facts of this case fail to demonstrate clearly that the defendants have proper standing to raise such challenges anyway.

3. Another contention advanced by defendants was that plaintiff failed to establish evidentially that large numbers of Wynmoor residents were actively seeking plaintiff's services. Without regard to the accuracy of defendants' characterization of the evidence, the statute in question, Section 718.1232, F.S., does not require such a showing or impose such a burden upon the provider of cable television service. The heart of

the statute is the right of condominium dweller to have access to available licensed or franchised cable television service without regard to any measure of the quantity of such persons who may or may not want to avail themselves of such access. The evidence in this case discloses that the actions of the defendants have improperly denied that right of access.

4. During the course of the trial certain evidence was presented with regard to easements and other agreements for right-of-way or right of entry, which, arguably, could be utilized by plaintiff in the physical location or installation of its cable television system within Wynmoor. The Court understood such evidence to be in the nature of general information about the mechanics of installing such a system because the evidence was also clear that until plaintiff was permitted entry into Wynmoor, it could not actually design or tailor a system for that complex. Accordingly, by this final decree the court does not rule upon the issue of the availability or non-availability, in whole or in part, to plaintiff of any particular easement or right-of-way within Wynmoor. Such specifics are not now before the Court, and indeed, may not, as a practical matter, ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the WYNMOOR COMMUNITY COUNCIL. In like manner, the Court by this final decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wynmoor. Such matter,

should the same became a legal problem at all, will depend upon subsequent events.

5. The Court has considered seriously plaintiff's request that defendants be enjoined for a period of time, not to exceed five months, from assisting Earthstar Communications or other entities competitive to plaintiff from soliciting Wynmoor unit owners or residents or otherwise providing them with competitive cable television service. The Court recognizes that by denying plaintiff access into Wynmoor in July 1981, when no such services competitive to plaintiff then existed, and by making arrangements with Earthstar for such services during the pendency of this litigation, the developer, WYNMOOR LIMITED PARTNERSHIP, through its subsidiary or affiliate, Computer Cable, may have gained for itself, or those with whom it is corporately intimate, some competitive advantage over plaintiff that would not otherwise have existed had defendants acted properly in the first instance. Despite the Court's sympathy for plaintiff's plight in such regard, nevertheless the Court declines to grant such relief on a permanent basis fearing that it would thereby unduly, albeit indirectly, enjoin the activities of non-parties and trusting that, in the wake of this decision and in the last analysis, the forces of the market place eventually will fairly determine any competitive contest.

WHEREFORE, in view of the foregoing findings and conclusions, the Court does hereby ORDER, ADJUDGE AND DECREE the following:

A. Under the law and facts of this case plaintiff has established its right, pursuant to Section 718.1232,

Florida Statutes, and otherwise, to enter Wynmoor in order that the condominium unit owners and residents of Wynmoor may have access to plaintiff's franchised cable television service.

B. Defendants have wrongfully denied such entry or access since July 17, 1981 and defendants and their officers, agents, representatives, employees and servants, together with all others encompassed by the scope of Rule 1.610(d), Florida Rules of Civil Procedure, (collectively "defendants") are hereby forthwith permanently enjoined from denying such entry or access to or otherwise interfering with plaintiff or its officers, agents, servants, employees or representatives (collectively "plaintiff") in the exercise of such right of entry and access. The scope and intent of this injunction and decree is such that plaintiff shall have the right to enter Wynmoor in order to survey and inspect the property for purposes of planning the design and installation of a system to furnish cable television service to the unit owner and residents of Wynmoor and shall have the further right to solicit customers and otherwise negotiate the terms, means and methods of providing service with unit owners, residents, and condominium associations located within Wynmoor, and defendants are permanently enjoined from interfering with the foregoing activities by Plaintiff.

C. This decree and the injunctions herein contained shall not take effect until the disposition by this Court of any proper and timely motions for rehearing which may be filed by any party. Should

any such motions be filed herein, the parties are hereby notified that the same shall be heard by the Court on August 18, 1982 at 11:00 a.m.

D. The preliminary injunction entered by this Court on January 14, 1982 shall, as a consequence, remain in force until this Final Judgment and Decree takes effect.

E. This Court reserves jurisdiction over this cause and the parties hereto for the purpose of making such determinations and taking such actions as may be judicially appropriate to assure meaningful access between plaintiff and the unit owners of Wynmoor consistent with Sections 718.1232, Florida Statutes, and the terms of this Final Judgment and Decree.

F. The Court further reserves jurisdiction over this action for the purpose of taxing costs against defendants by subsequent order after hearing upon proper motion.

DONE AND ORDERED this 9 day of July, 1982.

Mark E. Polen
CIRCUIT JUDGE

Copies Furnished Counsel

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Attorneys for Plaintiff

IN THE SUPREME COURT OF FLORIDA

TUESDAY JULY 26, 1983

CASE NO. 64,024

District Court of Appeal,
4th District – Nos. 82-825
& 82-1798

WYNMOOR LIMITED PARTNERSHIP and
WYNMOOR COMMUNITY COUNCIL, INC.,
Petitioners,

vs.

COCONUT CREEK CABLE T.V., INC., ET AL.,
Respondents.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Dubline Causseaux
Deputy Clerk

C

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Mark E. Polen, Judge

David M. Orshefsky, Esquire
Edward J. Campbell, Esquire
J. Cameron Story, III, Esquire
Mark B. Schorr, Esquire

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1983

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF

CASE NOS. 82-825 &
82-1798

WYNMOOR LIMITED PARTNERSHIP, and
WYNMOOR COMMUNITY COUNCIL, INC.,
Appellants,

v.

COCONUT CREEK CABLE TV., INC., et al.,
Appellees.

Decision filed June 29, 1983

Consolidated Appeals from the Circuit Court for Broward County; Mark E. Polen, Judge.

Terrence Russell, David M. Orshefsky and Robert A. Plafsky of Ruden, Barnett, McClosky, Schuster & Russell, P.A., Fort Lauderdale, for appellants.

Davis W. Duke, Jr., and J. Cameron Story, III of McCune, Hiaasen, Crum, Ferris & Gardner, P.A., Fort Lauderdale for appellee-Coconut Creek Cable T.V., Inc.

Mark B. Schorr of Becker, Poliakoff & Streitfeld, P.A., Fort Lauderdale, for appellees-Wynmoor Homeowners Association, Inc., Martinique Village II-C Condominium Association, Inc., and Norman Richman.

PER CURIAM

AFFIRM.

GLICKSTEIN, HURLEY, and DELL, JJ., concur.

[RECEIVED '83 SEP – 9]

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 82-1798
[Consolidated with
CASE NO. 82-825]

WYNMOOR LIMITED PARTNERSHIP and
WYNMOOR COMMUNITY COUNCIL, INC.,
Appellants,

v.

COCONUT CREEK CABLE T.V., INC., WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; and NORMAN RICHMAN,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC., Appellants herein and Defendant below, hereby appeal to the Supreme Court of the United States from the final order of this Court affirming the decision below, entered herein on June 29, 1983.

This appeal is taken pursuant to 28 U.S.C., §1257(2).

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(305) 764-6660 Miami: 944-3283

By: /s/ Terrence Russell
TERRENCE RUSSELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished by U.S. Mail to EDWARD J. CAMPBELL, ESQ., Levy, Shapiro, Keen & Kingcade, P.O. Box 2755, 218 Royal Palm Way, Palm Beach, Florida 33480; J. CAMERON STORY, III, ESQ., McCune, Hiaasen, Crum, Ferris & Gardner, P.O. Box 14636, 25 South Andrews Avenue, Fort Lauderdale, Florida 33302; MARK B. SCHORR, ESQ., Becker, Poliakoff & Streitfeld, P.A., 6520 North Andrews Avenue, P.O.

Box 9057, Fort Lauderdale, Florida 33310; this 9 day of September, 1983.

TERRENCE RUSSELL, ESQ.
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By: /s/ Terrence Russell
TERRENCE RUSSELL

[RECEIVED BY APPELLANT COUNCIL 7-14-81]
July 13, 1981

Mr. Jim Coffey, President
Wynmoor Community Council, Inc.
333 Coconut Creek Parkway
Coconut Creek, Florida 33066

Dear Mr. Coffey:

Our company, Coconut Creek Cable TV, Inc., is a Florida corporation engaged in the business of operating and maintaining a cable television transmission system in the City of Coconut Creek, Florida. The Company has been granted a franchise by the City Council of the City of Coconut Creek to operate and maintain a CATV System and to construct, operate and maintain such a system upon the streets, alleys, canals, easements, public ways and places within the City.

Pursuant to Section 16, Chapter 718, Florida Statutes (the "Condominium Act") as amended June 25, 1981 and in accordance with the Company's obligations under Local Ordinance No. 131-79, representatives of the Company shall begin installation of its cable within Wynmoor on July 17, 1981 at 8:30 a.m. All wires and cables will be laid underground unless there is a pre-existing electric or power line and every effort will be made not to hinder unnecessarily or obstruct the free use of the streets, sidewalks, driveways within Wynmoor during the construction process.

We anticipate that service can begin to the residents of Wynmoor within thirty days after construction begins. If you have any questions, please don't hestitate to call the undersigned.

Sincerely,

COCONUT CREEK CABLE TV, INC.

Anthony J. Genova
President

No. 83-524

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL,

Appellants

v.

COCONUT CREEK CABLE T.V., INC., WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit, and NORMAN RICHMAN,

Appellees

On Appeal from the District Court of Appeal for the State of Florida, Fourth District

MOTION TO DISMISS OR AFFIRM

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*Counsel of Record

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellee COCONUT CREEK CABLE TV, INC., is a Florida corporation. It is a subsidiary of TeleCable Technologies, Inc., a Virginia corporation. TeleCable Technologies, Inc., is a subsidiary of TeleCable Corporation, also a Virginia corporation. TeleCable Corporation is a subsidiary of Landmark Communications, Inc., a Virginia corporation.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-524

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL,

Appellants

v.

COCONUT CREEK CABLE T.V., INC., WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE VILLAGE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit, and NORMAN RICHMAN,

Appellees

On Appeal from the District Court of Appeal for the State of Florida, Fourth District

---

MOTION TO DISMISS OR AFFIRM

Appellee, COCONUT CREEK CABLE T.V., INC., moves this Court to dismiss the appeal herein or, in the alternative, to affirm the original judgment of the Fourth District Court of Appeal of Florida on the following grounds:

1. The first purported federal question presented by Appellants was never decided by the Florida Courts and therefore no state court has rendered a final decision on that question as required by 28 U.S.C. §1257;
2. The state courts decided Appellants' second purported federal question on adequate and independent state grounds; and
3. Appellants lack standing to raise the purported federal questions before this Court.

STATUTORY PROVISIONS

The jurisdictional statute under which this appeal is brought, 28 U.S.C. §1257, provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

City of Coconut Creek Ordinance No. 131-79 is set forth in full in the Appendix to this motion.

Section 718.1232, Florida Statutes, provides:

> No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

STATEMENT OF THE CASE

This case, as decided by Final Judgment and Decree (hereafter "Decree") of the Circuit Court of Broward County, Florida and affirmed *per curiam*, without opinion by the District Court of Appeal of the State of Florida, Fourth District, is not appealable to this Court pursuant to 28 U.S.C. §1257(2).

Appellants suggest two questions for this Court's review. (Juris. St. p. i.)[1] As for the first, the question was not actually decided below; therefore no state court has rendered a final appealable decision on the question. As for the second, the decision appealed from rests on adequate state and common law grounds. Finally, Appellants lack sufficient standing to raise either question at all.

COCONUT CREEK CABLE'S Complaint seeking the right of entry to WYNMOOR VILLAGE (hereafter "WYNMOOR") was premised upon (1) the common law; (2) its franchise from the city of Coconut Creek, Florida; and (3) Section 718.1232, Florida Statutes. In addition, it sought an injunction to prevent Appellants, WYNMOOR LIMITED PARTNERSHIP (hereafter "DEVELOPER") and WYNMOOR COMMUNITY COUNCIL, INC. (hereafter "COMMUNITY COUNCIL"), from interfering with that right. As stated in the Decree appealed from:

> The basic issue in this case [was] whether plaintiff [was] entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television services accessible to the residents thereof.

App. 2.[2]

---

1. "Juris. St." refers to Appellants' Jurisdictional Statement.

2. "App.____" refers to the Appendix submitted with Appellants' Jurisdictional Statement.

"I. App.____" refers to the Appendix submitted with Motion to Dismiss or Affirm of Co-Appellees.

"P. App.____" refers to the Appendix submitted with this Motion to Dismiss or Affirm.

That narrow issue was resolved in favor of COCONUT CREEK CABLE. It was the *only* issue decided in this case and the decision was based on adequate state grounds. The Decree expressly did not address any right of COCONUT CREEK CABLE to "install" cable television lines within WYNMOOR VILLAGE either with or without compensation.

In the Decree, the trial court summarized some of the evidence which it found decisive. WYNMOOR is a condominium project constructed and sold by the DEVELOPER in the City of Coconut Creek, Florida. At the time of trial, WYNMOOR consisted of about 3,500 condominium dwelling units, organized into approximately thirty-nine separate condominiums, each governed by its own "ASSOCIATION", together with certain recreational and other facilities used in common by all WYNMOOR unit owners or residents (hereafter "COUNCIL PROPERTIES"). The COUNCIL PROPERTIES consisted of, among other things, the wall surrounding WYNMOOR and its two security gates, as well as the system of roadways connecting the various parts of the project one to another and with the outside world. App. 2-3. The COUNCIL PROPERTIES were controlled by the COMMUNITY COUNCIL on behalf of and for the benefit of its non-voting members, the WYNMOOR unit owners. App. 2 and 7.

COCONUT CREEK CABLE is a provider of cable television services variously described as "satellite" or "premium channel" programming, to which the City of Coconut Creek, Florida (hereafter "CITY"), awarded a Franchise on January 24, 1980 to service the entire CITY, including WYNMOOR. App. 2-3. Ordinance No. 131-79 (hereafter "FRANCHISE") is set out in the Appendix hereto. P. App. 2a-22a. Among other things, the Franchise granted COCONUT CREEK CABLE the exclusive right to "to erect, construct, maintain and operate a CATV System within the CITY", and obligated it to commence construction promptly and begin servicing

customers under a rigid schedule designed to ensure service to ninety-five percent of the CITY's residential units ninety days thereafter. P. App. 4a-5a, 6a.[3]

The only cable television services available to WYNMOOR in July of 1980 were provided by one of the DEVELOPER's wholly owned subsidiaries, COMPUTER CABLE T.V. COMPANY (hereafter "COMPUTER"), pursuant to mandatory contracts imposed by the DEVELOPER upon each purchaser. These contracts, however, covered only a security alarm system and connections to a "master antenna" which distributed commercial or "off-the-air" programming. No premium channel cable television services of the type offered by COCONUT CREEK CABLE could be obtained by WYNMOOR residents, in spite of the fact that they had generally "been expressing a desire to have such services available for at least two years . . . ." App. 5.

By July 17, 1980, COCONUT CREEK CABLE had installed its system in the areas of the City surrounding WYNMOOR. On that day the DEVELOPER barred COCONUT CREEK from entering WYNMOOR through instructions given by James Coffey to a security guard. The DEVELOPER had appointed Mr. Coffey as President of both the COMMUNITY COUNCIL (which the DEVELOPER retained the right to control during construction and sometime thereafter) and COMPUTER. App. 2-3, 4. Thereafter, Mr. Coffey wrote to COCONUT CREEK CABLE, solely as President of COMPUTER, and justified the denial of access upon the grounds that (1) WYNMOOR's roads were private and under Appellants' control, and (2) Computer Cable T.V., Inc., provided all cable services to WYNMOOR residents. App. 3. This letter is also set out in the Appendix hereto. P.App. 1a.

Sometime subsequent to COCONUT CREEK CABLE's filing of the present action, the DEVELOPER

3. The validity of the franchise and its stated exclusivity were not issues for determination in the case. App. 2.

arranged to offer to WYNMOOR residents cable television services in competition with COCONUT CREEK CABLE through an entity known as "Earth Star Communications." On this point, the trial court concluded, "In short, Earth Star was granted access as plaintiff was being denied access." App. 5. Three WYNMOOR unit owners testified that they wished to have COCONUT CREEK CABLE'S services available. In addition, the INTERVENORS, seeking to represent WYNMOOR unit owners at large, favored COCONUT CREEK CABLE's right to enter WYNMOOR and contested the legality of Appellants' denial of access as contrary to the residents' wishes and therefore not on their behalf.

In reliance upon the foregoing evidence, the trial court ruled in favor of COCONUT CREEK CABLE, finding that, as a franchised provider of cable television services, it clearly was entitled "under law" to enter WYNMOOR. Rejecting Appellants' reasons for preventing COCONUT CREEK CABLE from entering WYNMOOR, the trial court found that "Defendant's actions in barring plaintiff to date are without legal cause or justification and are, therefore, wrongful." App. 6. As a result, the court concluded that Appellants ". . . should not in the future interfere with plaintiff's [Appellee, COCONUT CREEK CABLE] reasonable efforts to design *and plan the installation* of its system at Wynmoor and to communicate with and solicit Wynmoor Condominium Associations and residents for service." (Emphasis added.) App. 6.

No right to install cable television lines was granted and the narrow equitable relief afforded was based upon the public interest by virtue of the municipal franchise, the sizeable number of condominium owners affected, and the "public policy" enunciated in Section 718.1232. App. 7. The injunction provided only that:

> . . . [Appellants] and their officers, agents, representatives, employees and servants, together with all others encompassed by the scope of Rule 1.610(d),

> Florida Rules of Civil Procedure, (collectively "[Appellants]") are hereby forthwith permanently enjoined from denying such entry or access to or otherwise interfering with [COCONUT CREEK CABLE] or its officers, agents, servants, employees or representatives (collectively "[COCONUT CREEK CABLE]") in the exercise of such right of entry and access. The scope and intent of this injunction and decree is such that [COCONUT CREEK CABLE] shall have the right to enter Wynmoor in order to survey and inspect the property for purposes of planning the design and installation of a system to furnish cable television service to the unit owners and residents of Wynmoor and shall have the further right to solicit customers and otherwise negotiate the terms, means and methods of providing service with unit owners, residents, and condominium associations located within Wynmoor. . . .

App. 12.

The trial court felt that it would be premature to consider, let alone mandate, that Appellants or anyone else must permit COCONUT CREEK CABLE to install cable television lines on or over private property.

> Such specifics are not now before the Court, and indeed, may not, as a practical matter, ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the Wynmoor Community Council. In like manner, the court by *this Final Decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wynmoor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.* (Emphasis added.)

App. 10-11.

ARGUMENT

Appellants have the burden of demonstrating that the questions presented to this Court for review have been finally decided in the courts below as well as the burden of demonstrating that independent and adequate state grounds, such as those that exist in this case, were not the basis for the decision below. In their Jurisdictional Statement, Appellants have not addressed their burden for, as discussed below, they can not meet it.

I. THIS COURT SHOULD DISMISS APPELLANTS' FIRST QUESTION PRESENTED OR ALTERNATIVELY AFFIRM, BECAUSE IT WAS NEITHER EXPRESSLY PASSED ON BELOW NOR RAISED BY THE LANGUAGE OF SECTION 718.1232, FLORIDA STATUTES; THEREFORE, THE FLORIDA COURTS NEVER RENDERED A FINAL DECISION ON THAT QUESTION.

Addressing the present dispute, the Florida trial court wrote, "The basic issue in this case is whether plaintiff is entitled under law to access or entry into Wynmoor Village . . . ." App. 2. Therefore, the court

> [did] not address the issue of whether plaintiffs must be allowed . . . to install any particular cable system within Wynmoor or any part of Wynmoor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.

App. 10-11.

The lower court expressly declined to interpret or apply Section 718.1232, Florida Statutes, to grant COCONUT CREEK CABLE the right (or obligation) to *install* cable television lines or otherwise permanently occupy the premises of WYNMOOR. Moreover, the statute does not address the installation of cable television lines on or over private property. It simply states:

> No resident of any condominium dwelling unit, whether tenant or owner shall be denied access to any

> available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

In subsequent proceedings in this case, no Florida appellate court expressed an opinion on the issue. Consequenty, the Florida state courts have never decided whether Section 718.1232 permits a permanent physical occupation without compensation.

Nonetheless, Appellants raise the following as the first of their "Questions Presented":

> Whether Florida's cable television "access" statute relating to condominiums, Fla. Stat. Section 718. 1232 (1981), which grants to private cable operators the right to install cable television lines over and through private property without provision for compensation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Juris. St. i. In effect, Appellants ask this Court to recognize a construction of the Florida Statute which no Florida court has ever given it.

Appellants merely anticipate something that *may* happen in the future. That anticipation, however, is not sufficient to invoke this Court's jurisdiction under 28 U.S.C. §1257(2). The prerequisite to this Court's jurisdiction, lacking in the case at bar, is that the state courts render a "final decision" on the federal questions presented to the Court.

This Court discussed the ends served by the finality requirement of 28 U.S.C. §1257 in *North Dakota Phar-*

macy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973):

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

See also Radio Station W.O.W., Inc. v. Johnson, 326 U.S. 120, 124-125 (1945).

These purposes can only be served by dismissing Appellants' first question presented or, alternatively, summarily affirming the state court's decision to reserve the issue for a more appropriate time. The Florida courts then would have the opportunity to decide finally whether Section 718.1232, Florida Statutes, authorizes a permanent physical occupation of WYNMOOR without just compensation.

II. THIS COURT LACKS JURISDICTION TO REVIEW APPELLANTS' SECOND "QUESTION PRESENTED" BECAUSE THE STATE COURT DISPOSED OF THAT QUESTION ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Florida court found that, under Florida law, Appellant DEVELOPER does not have an exclusive property interest in WYNMOOR's roadways. On the contrary, the trial court found that:

> No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence [as opposed to Section 718.1232] that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them, as well as for the benefit of the DEVELOPER during the period of development.

App. 7. Consequently, the DEVELOPER was found not to have an exclusive property right that entitles it to exclude COCONUT CREEK CABLE from the Wynmoor development, at least as long as COCONUT CREEK CABLE was only surveying and designing a cable system or soliciting condominium residents.

The evidence upon which the court based its finding included public policy, numerous provisions of Florida's Condominium Act (set forth in Intervenor's Appendix), WYNMOOR's condominium documents, as well as COCONUT CREEK CABLE'S Franchise.[4] Given this evidence, it is clear that the court's finding is an interpretation of the nature of the DEVELOPER's property interest under Florida common law and Florida statutory condominium law. The statute Appellant seeks to draw into constitutional question simply was not dispositive of the only issue actually adjudicated below. Although the court noted that Section 718.1232 also supported Appellee's claim, the court did so unnecessarily. The various other grounds listed above were sufficient to dispose of COCONUT CREEK CABLE's claim.

As a result, this Court has no jurisdiction to hear appellants' second question on appeal. That question asks:

> Whether Fla. Stat. Section 718.1232 (1981), construed to allow ingress to private condominium property without the need for invitation, violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as applied to the facts of this case.

Juris. St. i.

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4. As the court below found no exclusive property right based on applicable Florida law, and since Appellee's right of entry expressly did not include a right to install cable television transmission lines on or over private property, Appellants cannot make out any cognizable injury. Therefore, they lack standing to raise even the questions they would pose before this Court. *See Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278, 282-283 (1961).

Because it found that the DEVELOPER has only a non-exclusive property interest in the roads of the condominium development, the lower court never had to respond to Appellant's challenge. Indeed, it stated:

> The Court does not reach the constitutional issues raised by defendants [Appellants here] because the facts of this case do not support such challenges to the validity of Section 718.1232, Florida Statutes.

App. 7.

Furthermore, the adequate and independent state grounds upon which the trial judge relied do not disappear merely because no higher Florida court issued an opinion. Because the Supreme Court of Florida dismissed Appellants' Petition for Review for want of jurisdiction, the Fourth District Court of Appeal became "the highest court in which a decision could be had" in this case. The Fourth District's *per curiam* affirmance, without opinion, provides neither precedent nor guidance as to that court's rationale. *See Department of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 312 (Fla. 1983).

As this Court has stated, "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citations omitted.]" *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). *See also Bachtel v. Wilson*, 204 U.S. 36, 40 (1907).

This Court has repeatedly acknowledged that its

> ". . . only power over state judgments is to correct them to the extent that they incorrectly adjudge Federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could

amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977). *Accord Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981).

Accordingly, the Supreme Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Pitcairn*, 324 U.S. at 125 (citing *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). This Court has stated that it has *no jurisdiction* to review state court decisions, such as the Decree, which rest upon a number of state grounds, one of which is not subject to federal challenge, when the unchallenged ground would be dispositive of the case. *Zacchini*, 433 U.S. at 568. Thus, in the present case, this Court lacks jurisdiction to review Appellants second question presented since the state court's interpretation of the Appellant's limited property rights under Florida law are dispositive of the case.

CONCLUSION

Based on the foregoing, the instant appeal should be dismissed for lack of jurisdiction. Alternatively, the decision of the State Court should be summarily affirmed.

Respectfully submitted,

McCUNE, HIAASEN, CRUM, FERRIS & GARDNER, P.A.
Post Office Box 14636
Fort Lauderdale, FLA 33302
Telephone: (305) 462-2000

/s/ Davis W. Duke, Jr.
Davis W. Duke, Jr.*

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Telephone: (215) 977-2228

/s/ Barry F. Schwartz
Barry F. Schwartz

Attorneys for Appellee
COCONUT CREEK CABLE T.V., Inc.

*Counsel of Record

APPENDIX

APPENDIX

COMPUTER CABLE T.V., INC. AT WYNMOOR
3333 Coconut Creek Parkway
Coconut Creek, Florida 33066
Telephone: 971-3500

CERTIFIED MAIL

July 15, 1981

Mr. Anthony J. Genova
President
Margate Video Systems, Inc.
Post Office Box 63-4669
Margate, Florida 33063

Dear Mr. Genova:

I have received your letters dated July 13th informing us that you were going to commence the installation of cable within Wynmoor on July 17th. Please be informed that all roads within Wynmoor Village are private roads and you do not have any authorization to install cable upon any property within Wynmoor Village. Please be advised that Computer Cable T.V., Inc. provides all cable services to the residents of Wynmoor Village.

Very truly yours,

COMPUTER CABLE T.V. INC.
/s/ James J. Coffey
JAMES J. COFFEY
President

JJC:tg
cc: Howard Goldberg
Robert Shapiro, Esq.
Glenn Cardoso
Ken Gart

ORDINANCE NO. 131-79

AN ORDINANCE GRANTING AN EXCLUSIVE FRANCHISE TO COCONUT CREEK CABLE T.V., INC., A FLORIDA CORPORATION TO CONSTRUCT, OPERATE AND MAINTAIN A CABLE TELEVISION TRANSMISSION SYSTEM IN THE CITY OF COCONUT CREEK, FLORIDA; PROVIDING FOR REGULATION BY THE CITY; PROVIDING FOR INITIAL RATES AND CHARGES; PROVIDING FOR RATE INCREASES; PROVIDING FOR A FRANCHISE FEE TO BE PAID TO THE CITY; PROVIDING FOR ADDITIONAL OBLIGATIONS OF FRANCHISEE; AND FOR OTHER PURPOSES.

WHEREAS, the City of Coconut Creek, Florida, did conduct a full, open and public hearing upon prior notice and opportunity of all interested parties to be heard, and

WHEREAS, careful consideration was given to the qualifications of all applicants, including their legal, character, financial and technical qualifications and the adequacy and feasibility of their construction arrangements;

NOW, THEREFORE, THE CITY OF COCONUT CREEK HEREBY ORDAINS:

SECTION 1: SHORT TITLE. This Ordinance shall be known and may be cited as the Coconut Creek Cable Television Transmission Franchise Ordinance.

SECTION 2: DEFINITIONS. For the purpose of this Ordinance, the following terms, phrases, words and derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular

number include the plural number. The word "shall" is always mandatory and not merely directory.

(a) "City" is the City of Coconut Creek, Florida.

(b) "City Council" is the City Council of the City of Coconut Creek, Florida.

(c) "CATV" shall mean a system for transmission of audio signals and visual images by means of electrical impulses, including cable T.V., M.D.S., S.T.V. and such ancillary services as pay television and cable communications such as two-way cable.

(d) "Company" shall be Coconut Creek Cable T.V., Inc.

(e) "Developed Area" shall mean any area within City from Sample Road South, and all areas within the City which have a minimal density of seventy-five dwelling units per street mile from Sample Road.

(f) "Gross Subscriber Revenues" shall include any and all revenues received by the Company from the Basic Monthly Service charge paid by Subscribers in the City, but Gross Subscriber Revenues shall not include any refunds or credits made to Subscribers or any taxes imposed on the services, furnished by Company, nor shall it include revenue from "auxiliary" services such as pay-cable, advertising, leased channels, emergency alert protection, or any cable communications (e.g. two-way).

(g) "Franchise" shall mean the exclusive authorization granted hereunder by the City to install, operate, and maintain a CATV System and furthermore, to construct, operate and maintain a CATV System upon the streets, alleys, canals, easements, public ways and places of the City.

(h) "Franchise Area" shall include the present territorial limits of the City and any territory henceforth added thereto during the term of this Ordinance.

(i) "Subscriber" shall mean any person receiving for any purpose the service of the CATV System from the Company herein for the payment of a fee.

(j) "Cable Television System or System" shall mean a system of antennas, cables, amplifiers, towers, microwave links, waveguides, satellites, or any other conductors, converters, equipment or facilities designed and constructed for the purpose of producing, receiving, amplifying, storing, processing or distributing audio, video, digital or other forms of electronic or electrical signals capable of being transmitted by wire, cable or radio to subscribing members of the public who pay for such service.

(k) "MDS" shall mean multiple distribution system.

(l) "STV" shall mean subscription television signal.

(m) "Federal Communications Commission or FCC" shall mean that agency as presently constituted by the United States Congress or any successor agency authorized by the Congress to regulate cable television systems.

SECTION 3: FRANCHISE GRANT. In consideration of the faithful performance and observation of the conditions and reservations herein specified, and in consideration of the Company's legal, character, financial, technical and other qualifications, and the adequacy and feasibility of its construction arrangements, and further, in consideration of the payments of the amounts provided herein, the exclusive right is hereby granted to Company, its successors, assigns or designees, to erect,

construct, maintain and operate a CATV System within the City, in, under, over, along, across and upon streets, lanes, avenues, sidewalks, alleys, bridges, canals, public places, and all public easements, including canal maintenance and drainage easements over which the City exercises jurisdiction, for the purpose of transmission and distribution of audio and visual impulses and radio and television energy, including cable T.V., M.D.S., S.T.V. and such ancillary services as pay television and cable communications such as two-way cable, in accordance with the laws and regulations of the United States of America, the State of Florida, and the ordinances and regulations of the City for the period provided for in the Ordinance. The right of use and occupancy of public property and public easements for the purpose herein set forth shall be non-exclusive; provided the City shall not grant the same use of public property or easements to any person or entity for the purpose of operating a CATV System at any time during the period of this Ordinance, or any renewal period. City reserves the right ot grant a similar use of public property to other utilities, such as, but not limited to electric, telephone, gas, water and waste water, etc., utilities.

SECTION 4: INITIAL SURETY BOND. The Company shall within sixty (60) days of the effective date of this Ordinance post with the City a surety bond in the amount of $5,000, conditioned upon compliance with Section 5 hereof. Said bond will remain in full force and effect for a period of one year. However, the City may require said surety bond to be renewed for successive one year periods to insure continued compliance with this Ordinance.

SECTION5: CONSTRUCTION AND INSTALLATION.

(a) Company shall begin customer installation within thirty (30) days after all of the following occur:

1. This Ordinance becomes law.
2. Company shall have obtained necessary permits including but not limited to pole attachment permits from Southern Bell Telephone and Telegraph and Florida Power and Light.
3. Company shall obtain street cut permits from City.
4. Registration has been filed with F.C.C. and no objections have been filed.

(b) Within Ninety (90) days of commencement of construction, Company shall have progressed in its construction schedule to the point where service is available to ninety-five per cent (95%) of the residential units existing in the Developed Area at the time of passage of this Ordinance.

(c) The Company's transmission and distribution system poles, wires and appurtenances shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or to interfere with new improvements the City may deem proper to make, or hinder unnecessarily or obstruct the free use of alleys, street-bridges, canals or other public property. Company will bore under streets, sidewalks, driveways, and other paved surfaces whenever possible in installing its transmission lines rather than making surface cuts. Wires and cables will be underground in all cases unless there is a pre-existing telephone or electric power line.

(d) It is the stated intention of City that all holders of public licenses, permits, and franchises within the corporate limits of City shall cooperate with Company wherever possible and wherever such usage does not interfere with the normal operation of said poles and pole lines, so that the num-

ber of new or additional poles constructed by Company may be minimized. To the extent that it is within the City's power to do so, the City hereby grants the right, privilege and authority to the Company to lease, rent, or in any other lawful manner obtain the use of towers, poles, conduits, lines, cables and other equipment and facilities from any and all holders of public licenses and franchises within the City, and to use on such terms as agreed upon with such parties, such towers, poles, conduits, lines, and cables and other equipment and facilities.

(e) Company shall extend to City, free of expense, joint use of any and all poles owned by it for any proper municipal purpose insofar as may be accomplished without interference with the use and enjoyment of Company's own cables and fixtures. City shall hold Company harmless from any and all actions, causes of action or damage caused by the placement of City's wires or appurtenances upon the poles of Company.

(f) Company shall have the authority, subject to the supervision and direction of the City, to trim trees over and overhanging all streets, alleys, easements, sidewalks and other public places within City so as to prevent the branches of such trees from coming into contact with the facilities of the Company.

(g) All transmission distribution structures, lines and equipment erected by Company within the City shall be so located as to cause a minimum of interference with the rights and reasonable convenience of property owners who adjoin any of the said streets. The cable television system shall be constructed and operated in compliance with all City, County, State and national construction and electrical codes and shall be kept current with new codes.

(h) Whenever the City shall require the relocation or reinstallation of any property of Company in any of the streets of the City, it shall be the obligation of Company upon sixty (60) days notice of such requirement to immediately remove and relocate or reinstall such property as may be reasonably necessary to meet the requirements of the City. Such relocation, removal or reinstallation by Company shall be at the sole cost of Company.

SECTION 6: STANDARDS AND REQUIREMENTS.

(a) Company will design a two-way community antenna transmission system which will conform to the highest present state-of-the art in the field of closed circuit television transmission. The system will have the ability to provide distribution of television signals, FM signals and locally originated programming. The system design concept will be a full forward thirty-six (36) channel design with capability of four (4) return and data channels within the same design (enabling 2-way service in the future). The return signal can be activated with the insertion of an additional modulator at the origination point and modules at the appropriate amplifiers. The system will utilize Scientific-Atlanta Series 6500 Sub-Split Electronics.

(b) Construction, maintenance and operation of the transmission distribution system, including house connections, shall be in accordance with the applicable rules and regulations of the FCC and any applicable state, county or city statute, Ordinance, rule or regulation, and shall conform to the provisions of the National Electrical Safety Code prepared by the National Bureau of Standards, the National Electrical Code of the National Board of Underwriters. The system shall be adequately

grounded according to the best cable industry practices.

(c) In the maintenance and operation of the television transmission and distribution system, and in the course of any new construction or addition to its facilities, the Company shall proceed so as to cause the least possible inconvenience to the general public. Any opening or obstruction in the streets or other public places made by the Company in the course of its operations shall be guarded and protected at all times by placement of adequate barriers, fences or boardings, the bounds of which, during periods of dusk and darkness, shall be clearly designated by warning lights.

(d) In case of any disturbance of pavement, sidewalk, driveway or other surface, Company shall, at its own expense and in the manner approved by City, remove, replace and restore all pavement, sidewalk, driveway or surface so disturbed in as good condition as before said work was commenced. Upon failure of the Company to commence, pursue or complete any work required by law or by the provisions of this Ordinance to be done in any street or public place, within a reasonable time and in a reasonable manner, the City Building Department may, at its option, cause such work to be done and the Company shall pay to the City the cost thereof in itemized amounts reported by the City Building Department to the Company within thirty (30) days after receipt of such itemized report. Company will post and keep in effect all all times during the period of this franchise a good and sufficient surety or cash bond in the amount of Five thousand and 00/100 dollars conditioned upon Company's performance of this sub-section.

(e) Company shall provide such signals of television broadcast stations as it is required to carry under Rules, Regulations and Orders of the FCC and such additional signals as it may apply for and be authorized to provide by the FCC.

(f) Company shall conduct performance tests in accordance with the requirements of Section 76.601 or any successor section of the FCC's Rules, as these requirements may apply from time to time.

(g) The performance of Company's cable television system shall meet the technical standards set forth in Section 76.605 or any successor section of the FCC's Rules, as those standards may apply or be extended from time to time.

(h) A full two-way system with fire, police and medical alarm service will be provided within 6 months from the date Company has received a written commitment for such service from at least 500 of the owners of residential units within the city limits of the City of Coconut Creek. For purposes of determining whether or not the threshold number of prospective customers has been reached, Company will conduct a survey of the residences and complete same within six months from the effective date of this franchise; and will repeat such survey at least once each year thereafter until the two-way system is in operation. For purposes of verifying the results of such survey or surveys, the City of Coconut Creek will be furnished with copies of all documents utilized by Company in conducting the survey together with copies of all signed requests for service.

SECTION 7: SERVICE

(a) Company shall maintain and operate its system and render efficient service.

(b) Whenever it is necessary to shut off or interrupt service for the purpose of making repairs, installations or adjustments, Company shall do so at such times as will cause the least amount of inconvenience to its Subscribers, and unless such interruption is unforseen and immediately necessary, it shall give reasonable notice thereof to its Subscribers.

(c) The Company agrees and binds itself to extend its lines to any "Developed Area" and to serve any and all applicants for CATV service whose dwellings or places of business are located within the "Developed Area" and who in good faith have signified their willingness to subscribe for such CATV service.

(d) The Company shall have the right to prescribe the reasonable service rules and regulations for the conduct of its business, not inconsistent with the provisions of this Ordinance. The Company shall have the responsibility of interpreting and administering such rules and regulations on a fair and equitable bases.

(e) Service calls will be made within 48 hours of request, free of service charge.

(f) Requests for termination of service will be honored immediately.

(g) Company will maintain service representatives on twenty-four (24) hour call duty, including weekends and holidays. Emergencies or system malfunctions will receive immediate attention.

SECTION 3: RATES

(a) The Company shall have the right to charge and collect compensation from all Subscribers, except those municipal buildings granted free service as prescribed by this Ordinance. To the extent per-

mitted by State and Federal law, the City shall have the right and jurisdiction to approve initial rates as well as rate increases requested by the Company for basic cable T.V. service. Initial rates for basic cable T.V. service and installation as approved by the City are attached in "Schedule A". These rates have been approved as fair and reasonable charges for the services to be rendered.

(b) Upon a written request by the Company to increase the rates established in "Schedule A", the City may require a public hearing which shall be held within thirty (30) days of such written request. The City shall then have an additional thirty (30) days within which to render a decision approving, or disapproving the rate increases. If such decision is not rendered by a majority vote of City Council within sixty (60) days of the initial request, such request will be deemed approved. Further, it will not be necessary for the Company to seek approval of the basic cable rate to the extent that the basic cable rate is not increased more than one time in any twelve month period in accordance with the cumulative increase, if any, in the cost of living based upon the Consumer Price Index for All Urban Consumer United States Average (hereinafter called the "Index") published by the Bureau of Labor Statistics of the United States Department of Labor. The increase shall be computed as follows:

1. The Index number for the U.S. for "All Items" for the month that this Ordinance is adopted shall be the Base Index Number and the corresponding Index Number for the same month of each succeeding year shall be the Current Index Number.

2. The Base Index Number shall be subtracted from the Current Index Number. The result-

ing difference shall be divided by the Base Index Number and the resulting quotient shall be multiplied by one hundred. Any resulting positive number shall be deemed to be the cumulative percentage of increase in the cost of living.

3. The permissible increase in rates shall be the product of such rate multiplied by the cumulative percentage of increase in the cost of living. Any rate increase made pursuant to this proviso shall be immediately filed with the City Clerk together with all supporting data to justify such increase without City approval. In the event the City Council should determine that such increase may not be justified, a public hearing will be held within 45 days of date of filing with City. Company shall have the burden of proving to City's satisfaction the justification of such increase.

(c) There will be no monthly service charge for any period of time when service is not available through no fault of the consumer. An installation charge will not be assessed for a standard installation on the first two outlets for any residence during the initial installing period in any area of the City when service in such area first becomes available. The free installation period shall be in effect for one year after commencement of construction.

SECTION 9: PUBLIC SERVICE. The Company shall provide a free installation and provide basic service at no charge to all municipal buildings within the city limits upon request by City Council.

SECTION 10: INSURANCE. The Company shall indemnify and save City harmless from and against all claims for injury and damage to persons or property

caused by the construction, erection, operation, and maintenance of any structure, equipment, appliance or product used pursuant to the authority granted herein. Company shall keep in full force and effect during the term of this franchise or extension thereof comprehensive public liability insurance policies with liability limits of $100,000 for property damage, $300,000 for personal injury to each person, and $300,000 for each accident. Company shall file a certificate of insurance evidencing the issuance of such policy, with City. The foregoing insurance contract shall require thirty (30) days written notice of any cancellation to both City and Company.

SECTION 11: LENGTH OF TERM.

(a) The rights granted hereunder shall be exclusive and shall take effect and be in full force from and after the date of acceptance by the Company, and shall continue in full force and effect for a period of *20 years* from the date of this Ordinance.

(b) Company shall have the option to renew this franchise for an additional period of twenty (20) years.

SECTION 12: FRANCHISE FEE.

(a) The City shall receive, as a franchise fee, a sum equal to three per cent (3%) of the Gross Subscriber Revenues of the Company.

(b) Within ninety (90) days of the close of business at the end of the Company's fiscal year, the Company shall deliver to the City Clerk, payments of the franchise fee. All such payments shall be based upon the fiscal records of the Company for the preceding fiscal year or portion thereof.

(c) The City shall have the right to inspect Company's records showing the gross subscriber revenues from which its franchise payments are computed and

shall have the right of audit and recomputation of any and all amounts paid under the franchise.

(d) All books and records of Company concerning its operations within the City shall be made available for inspection and audit by the City of Coconut Creek or its designate within thirty (30) days after any request for such inspection or audit shall be made.

(e) In the event the applicable FCC regulations should be amended to permit a franchise fee in excess of the three per cent (3%) allowable at the time of the passage of this Ordinance, the fee set forth above in Section 12(a) may be increased by the City Council.

SECTION 13: THEFT OF SERVICE.

(a) From and after the effective date of this Ordinance it shall be unlawful for any person, firm, partnership, association, corporation or organization of any kind ("Person") to make or use any connection, whether physically, electrically, acoustically, inductively or otherwise, with any wire, cable, conduit, apparatus or equipment of a cable television system with intent to enable himself, or others to receive or use any signal without the consent of, or payment to, the cable television system owner. It shall be unlawful for any Person to willfully tamper with, remove or damage, or cause to be tampered with, removed or damaged, any wire, cable, conduit, apparatus or equipment of a cable television system without the consent of the cable television system owner.

(b) The existence of any of the conditions with reference to wires, cables, conduits, apparatus or equipment described in Subsection (a) above is presumptive evidence that the Person receiving or using any signal by means of such condition,

has created or caused to be created the condition so existing with intent to receive or use such signal without payment to the cable television system owner.

SECTION 14: PREFERENTIAL OR DISCRIMINATORY PRACTICES PROHIBITED.

Company shall not as to rates, charges, services facilities, rules, regulations or in any other respect make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, provided, however, connection and service charges may be waived or modified during promotional campaigns of Company.

SECTION 15: REVOCATION OF FRANCHISE.

(a) In addition to all of the rights and powers reserved or pertaining to the City, the City reserves as an additional, separate and distinct power the right to terminate the franchise and all rights and privileges of Company hereunder in any of the following events or for any of the following reasons:

1. Company shall by act or omission violate any material term or condition of this Ordinance and not cure any such violations within the time limits set forth below. The City will give Company sixty (60) days written notice of any such violations, and Company will have the sixty (60) days provided for in the notice to cure any violations, provided, however, that with respect to any violations not susceptible of being cured within said sixty (60) day period, the time for the Company to cure any such violations shall be extended for as long as is necessary to cure such violations if Company commences promptly and proceeds diligently to cure such violations.

2. Company becomes insolvent, unable or unwilling to pay its debts or is adjudged a bankrupt.

(b) Company shall not be declared in default or be subject to any sanction under any provision of this Ordinance in any case in which performance of any such provision is prevented for reasons beyond its control.

SECTION 16: PROCEDURES.

(a) Any inquiry, proceeding, investigation or other action to be taken or proposed to be taken by the City in regard to Company's cable television system shall be taken only after thirty (30) days written notice to the Company and an additional thirty (30) days public notice of such action or proposed action is given.

(b) The public notice required by this Section shall state clearly the proposed action to be taken, the time provided for response and the person or persons in authority to whom such responses should be addressed, and such other procedures as may be specified by the City. Company shall be a necessary party to any proceedings specified by the City.

SECTION 17: INVESTIGATION AND RESOLUTION OF COMPLAINTS.

(a) Company shall maintain a business office accessible to residents of the City of Coconut Creek for the investigation and resolution of all complaints regarding the quality of service, equipment, malfunctions and similar matters. Residents of the City shall be able to communicate with the business office without incurring long distance toll charges.

(b) In the event that a complaint or dispute about cable television services is not resolved by Com-

pany, it may be submitted to the City Clerk in writing and shall contain: (1) the name and address of the complainant; (2) the name of the cable system against which the complaint is made; (3) a complete statement of facts upon which the complaint is based and (4) a description of the complainant's efforts to resolve the complaint with Company. Upon receipt of any such complaint, the City Clerk will forward a copy to Company. Within such time as may be prescribed by the City Manager, Company may file a written statement in response to the Complaint. The City shall then have the power to make any further investigation of the complaint it deems desirable, to conduct a public hearing on the complaint if it deems such hearing to be desirable, and to resolve the issues raised by the complaint.

SECTION 18: MINIMUM CHANNEL CAPACITY AND PROVISION OF ACCESS CHANNELS.

Company shall comply with the channel capacity, equivalent bandwidth, and access channel requirements and other applicable requirements of the rules and regulations of the FCC, as those requirements may be amended from time to time, unless the FCC waives those requirements. Grantee is authorized to operate its access channels in the City on a shares basis with other nearby communities if authorized to do so by the FCC.

SECTION 19: MODIFICATION OF FCC RULES.

Any modification or amendment of the applicable rules and regulations of the FCC shall, to the extent applicable, be considered as part of any franchise granted pursuant hereto as of the effective date of the amendment made by the FCC and shall be incorporated in this Ordinance by reference as the same may be adopted from time to time.

SECTION 20: ASSIGNMENT.

The franchise may not be sold, assigned or transferred to any other person, corporation or other entity without first obtaining the written approval of the City Council, which shall not be unreasonably withheld; provided, however, provisions of this section shall not apply to a transfer in trust, mortgage, or any other transfer to secure indebtedness.

SECTION 21: SUPPLEMENTAL PROVISIONS.

In addition to the requirements of the Company otherwise contained herein, the Company shall:

(a) Provide a subscription television channel, or channels, with special programming as a supplement to subscribers of the basic service, which channels shall be made available to all subscribers on an optional basis at a rate or rates to be determined by the Company for each such subscription television channel.

(b) Make available to the City, without charge, cablecast time on a channel controlled and operated by the Company.

(c) Make available, without charge, to the community, a cablecast time on a channel controlled and operated by the Company which shall be available on a reserved basis for local organizations domiciled or doing business in the City, provided said users, shall at their expense, provide the necessary transmitting equipment for said channel. In the event special receiving equipment is required as a result of said use, then and in that event the granting authority, at its expense, shall provide such specialized receiving equipment.

(d) Make available, without charge, to all organized educational institutions, domiciled or doing business in the City, a cablecast time on a channel

controlled and operated by the Company for the purpose of providing educational television to handicapped individuals confined to their homes. Said educational institutions shall provide, at their expense, the necessary transmitting equipment for said channel. In the event special receiving equipment is required as a result of said use, then and in that event, said educational institution, at their expense, shall provide such specialized receiving equipment. The programming material shall be furnished by the educational institution utilizing the channel.

SECTION 22: ACCEPTANCE.

The franchise granted hereunder shall be accepted by Company by written acknowledgment filed with the City not later than thirty (30) days after final passage of this Ordinance.

SECTION 23: SEVERABILITY.

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held illegal, invalid or unconstitutional by the decision of any Court of competent jurisdiction or the FCC, such decision shall not affect the validity of the remaining portions thereof. The City hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared illegal, invalid or unconstitutional. The invalidity of any portion of this Ordinance shall not abate, reduce or otherwise affect any consideration or other obligation required by the City or the Company of the franchise granted hereunder.

SECTION 24: PUBLIC HEARING.

The City acknowledges that it did conduct a full, open and public hearing upon prior notice and opportunity of

all interested parties to be heard, and further, the City gave careful consideration to the qualifications of all applicants, including their legal, character, financial, and technical qualifications and adequacy and feasibility of their construction arrangements.

SECTION 23: EFFECTIVE DATE.

This Ordinance shall take effect and be in full force and effect upon the filing of the written acceptance by Company as set forth above.

PASSED FIRST READING THIS 13 DAY OF December, 1979.

PASSED SESOND READING THIS 10 DAY OF January, 1980.

PASSED THIRD READING THIS 24 DAY OF January, 1980.

/s/ Joseph Merendino
JOSEPH MERENDINO
Mayor

ATTEST:

/s/ Angela A. Bender
ANGELA A. BENDER
City Clerk

SCHEDULE A

RESIDENTIAL RATES

First Outlet	
Installation Charge	$29.95
Basic Monthly Service Charge	$ 7.95
Additional Outlets (each)	
Installation Charge	$14.95
Basic Monthly Service Charge	$ 2.95

COMMERICAL RATES

Installation Charge—based upon time and material cost	
Basic Monthly Service Charge—First Outlet	$ 7.95
Additional Outlets (each)	$ 2.95

MISCELLANEOUS

Reconnect Charge (wiring in place)	$14.95
Relocate Outlet	$14.95

NO. 83-524

in the Supreme Court of the United States

October Term, 1983

WYNMOOR LIMITED PARTNERSHIP and WYNMOOR COMMUNITY COUNCIL, INC.,
Appellants,

vs.

COCONUT CREEK CABLE T.V., INC.; WYNMOOR HOMEOWNERS ASSOCIATION, INC., a Florida corporation not for profit; MARTINIQUE II-C CONDOMINIUM ASSOCIATION, INC., a Florida corporation not for profit; and NORMAN RICHMAN,
Appellees.

On Appeal from the Fourth District Court of Appeal for the State of Florida

MOTION TO DISMISS OR AFFIRM

MARK B. SCHORR, ESQ.
BECKER, POLIAKOFF & STREITFELD, P.A.
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Fort Lauderdale, FL 33310-9057
Telephone: (305) 776-7550

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellee Martinique Village II-C Condominium Association, Inc., a Florida corporation not for profit, is a Florida Condominium Association. Pursuant to the provisions of the Articles of Incorporation of Appellant Wynmoor Community Council, Inc. (formerly known as Rossmoor Coconut Creek Community Council, Inc.), Appellee Martinique Village II-C Condominium Association, Inc. is the entity entitled to select one representative from its Board of Directors to be a member of Wynmoor Community Council, Inc. The other Condominium Associations in the Wynmoor community likewise comprise the rest of the voting membership of Appellee Wynmoor Community Council, Inc.

By virtue of the Articles of Incorporation of Wynmoor Community Council, Inc., however, Appellant Wynmoor Limited Partnership is entitled to, and does, appoint a majority of the directors of the Council, thereby completely controlling its affairs. This right will terminate on September, 1984, when the Board of Directors of Wynmoor Community Council, Inc. will consist of one director designated by each of the Condominium Associations, including Martinique Village II-C Condominium Associations, Inc.

Appellee Wynmoor Homeowners Association, Inc., is a Florida corporation not for profit. It is neither owned by any parent corporation, has any subsidiary or affiliate corporations, nor has any interrelationship with any other corporate entities.

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No. 83-524

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees Wynmoor Homeowners Association, Inc., Martinique Village II-C Condominium Association, Inc., and Norman Richman, collectively referred to herein as "Appellees/Intervenors", hereby file this their Motion to Dismiss or Affirm this appeal.

STATUTORY PROVISIONS

The text of the relevant provisions of Fla. Stat. §§718.103, .104, .106, and .111 (1981) are set forth in full in the Appendix.

STATEMENT OF THE CASE

This case involves a condominium developer, one of the Appellants herein (whose affiliate happens to be in the cable television business) attempting to keep the operator of another cable television business, Appellee Coconut Creek Cable T.V., Inc., from contacting people to whom the Developer has sold condominium units (Appellees/Intervenors), simply because that second cable television operator is a competitor of the Developer's affiliate. As will be shown herein, neither Appellant has ever raised any reason why that second cable television operator should be prohibited from competing with the Developer's affiliate.

Appellants' recitation of the procedural history of this case, contained in the "Jurisdictional Grounds" section of their Jurisdictional Statement, is basically accurate. Appellants' description of the facts and issues in this case, however, as contained in their Statement of the Case, both contradicts almost all of the trial court's Final Judgment and Decree, *App.* 1-14,[1] and is woefully incomplete. Their description of the factual setting of this case is consistent: throughout these proceedings, they have conveniently ignored both the fact that this case involves a condominium community, and the very provisions of the condominium documents which encumber the entire community as covenants running with the land. Fla. Stat. §718.104(7) (1981).

---

[1] "*App.* ____" refers to the Appendix attached to Appellants' Jurisdictional Statement.

"*I. App.* ____" refers to the Appendix attached to this Motion to Dismiss or Affirm.

The statute at issue, Fla. Stat. §718.1232 (1981), is a section of the Florida Condominium Act, Chapter 718, Florida Statutes.

The Final Judgment and Decree does not discuss the nature of condominiums, or unit owners' and condominium associations' property rights, as they are well understood in a state where over 20% of the population lives in condominium housing.

Under Florida law, "condominium" means that form of ownership of real property which is created pursuant to the provisions of Chapter 718, Florida Statutes, and which is comprised of individually owned units, and there is, appurtenant to each unit, an undivided share in common elements. Fla. Stat. §718.103(9) (1981).

"Condominium property" means the land subject to condominium ownership, and all easements and rights appurtenant thereto intended for use in connection with the condominium. Fla. Stat. §718.103(11) (1981). A condominium "unit" is a part of the condominium property subject to exclusive ownership. Fla. Stat. §718.103(16) (1981). "Common elements" is that part of the condominium property not included in the units. Fla. Stat. §718.103(6) (1981). A "condominium parcel". *i.e.*, the unit plus any appurtenances thereto and an undivided share of the common elements, is a separate parcel of real property. Fla. Stat. §718.106(1) (1981).

A condominium is created by the filing of a declaration of condominium, pursuant to the requirements of Fla. Stat. §718.104 (1981). The declaration may also contain additional covenants, rights and restrictions, either within the declaration itself, or in exhibits attached

thereto. All of such exhibits become a part of the declaration of condominium, as if fully set forth therein. *E.g., Waterford Point Condominium Apartments, Inc. v. Fass*, 402 So.2d 1327 (Fla. 4th DCA 1981), *rev. denied*, 412 So.2d 465 (Fla. 1982). All provisions of a declaration, or its exhibits, are enforceable equitable servitudes, and covenants running with the land. Fla. Stat. §718.104(7) (1981). As used herein, "condominium documents" means a declaration of condominium, and all exhibits thereto.

A condominium "association" is the corporate entity responsible for the operation and management of a condominium. Fla. Stat. §§718.103(2), 718.111 (1981).

A brief description of some of the players in the cast of characters will help to put this case in perspective.

Appellee Coconut Creek Cable T.V., Inc., is a cable television company which holds a municipal franchise from the city in which Wynmoor Village is located. Appellee Martinique Village II-C Condominium Association, Inc. (herein "Appellee/Association") is one of 39 separate Condominium Associations existing within the Wynmoor Village community.

Appellant Wynmoor Community Council, Inc. (herein "Appellant/Council"), formerly known as Rossmoor Coconut Creek Community Council, Inc., was created by Appellant/Developer's predecessor. Its Board of Directors is still controlled by the Developer, although unit owners other than the Developer, through their respective Condominium Associations, are entitled to elect a majority of the Board of Directors in September, 1984, pursuant to the provisions of the Articles of Incorporation of the Council. *I.App.* ____.

Appellant Developer, and its predecessor, in creating each of the condominiums in the Wynmoor Village community, attached as exhibits to each declaration an Agreement for Use and Conveyance between itself and Council (*I.App.* 12-15), and the Articles of Incorporation of Appellant Council (*I.App.* 16-19).

The property at issue in this case is the main entranceway and gatehouse, and the arterial roadways in the Wynmoor Village community. The Final Judgment and Decree construed the various condominium documents encumbering the roadways, and found that:

> No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them, as well as for the use and benefit of the developer during the period of development. Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

App. 7. This finding was based on the provisions of the various condominium documents introduced into evidence, including the Agreement for Use and Conveyance. Relevant portions of same are contained in the Appendix to this Motion. (*I.App.* 12-28). While there was a dispute regarding whether or not title to the gatehouse and roadways had already been conveyed from Developer to Council, it was not disputed that the gate and roadways are encumbered by provisions of the Agreement for Use and Conveyance granting the unit owners the rights described in the Final Judgment.

It was not disputed that Developer must relinquish "control" of the Council by September, 1984, must convey title to the roadways to Council by December, 1984, and that Council exists for the purpose of operating the roadways for the benefit of the unit owners, and, upon acquiring title to them, to hold the roadways in trust for its unit owner members.

Contrary to the footnote on page 6 of Appellants' Jurisdictional Statement, the trial court specifically allowed Appellees/Intervenors to raise this issue, denying a motion to strike the following avoidance to the Appellants' defense of an unconstitutional "taking":

> Defendant/DEVELOPER has no standing to assert these property rights on its own, unilaterally, as the property rights to the areas within the community which are not within the boundaries of the various Condominiums are held in common by all unit owners in Wynmoor Village, not just Defendant/ DEVELOPER; or, the property rights asserted are in the common elements of the various Condominiums within Wynmoor Village, including MARTINIQUE II-C, in which Defendant/ DEVELOPER has no interest.

Thus, Appellants' standing to raise the asserted property rights, and the very nature of those rights, were always in issue, and were, in fact, adjudicated by the construction of the condominium documents in the Final Judgment and Decree. *App.* 7.

The Final Judgment and Decree, *App.* 1-14, accurately summarizes the case. As it recites, Appellee

Coconut Creek Cable T.V., Inc. premised its right of entry on three grounds: the common law, the municipal franchise, and the subject Statute. Appellant Coconut Creek Cable T.V., Inc. did not get all the relief it sought in its Complaint, as the trial judge never reached the issue of its right to lay cable in any particular place.

The Final Judgment concludes that Appellee Coconut Creek Cable T.V., Inc. has the right to enter Wynmoor Village, to solicit potential customers, and to survey the development for the purpose of planning the design and installation of the system. It found the right of access to be supported by *both* the municipal franchise and the statute. With respect to the Appellants' defenses, the Final Judgment found no justification for barring access, made no finding on title to the roadways, and did not reach the many constitutional issues raised by Appellants, finding a lack of standing to raise same, anyway, based on the evidence. The Court further found that the Statute, by its terms and under the facts of the case, did not result in a taking of any of Appellants' property.

MOTION TO DISMISS FOR LACK OF JURSIDICTION

This appeal should be dismissed for lack of jurisdiction, on one or all of the following grounds:

1. The federal question was not actually decided by the appellate court.

2. The decision appealed from rests on adequate non-federal grounds.

3. Appellants lack sufficient standing to raise the federal question.

4. Insofar as the asserted federal question is concerned, the decision is not final.

The Federal Question Was Not Actually Decided.

What was actually decided by the District Court of Appeal, which affirmed the Final Judgment and Decree without opinion? One can only guess; in Florida, a "per curiam affirmance" stands for nothing. There is no presumption the decision was on the merits, and the rationale and basis for the decision is always subject to speculation: there is no limit to the grounds which may prompt a "PCA". *Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So.2d 310 (Fla. 1983).

Some basic principles of appellate review lead to the conclusion that the appellate court did not pass on the constitutionality of the Statute. First, Florida courts do not determine constitutional questions if the case may be decided on other grounds. *E.g., Century Village, Inc. v. Wellington E. F, K, L, H, J, M & G Condominium Association*, 361 So.2d 128 (Fla. 1978) (involving another developer subsidiary of Cenville Development Corp.). Second, appellate courts do not decide unripe issues, not involving an actual controversy and unrelated to a specific factual situation, *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), nor will the courts pass on matters which are contingent, uncertain, or which rest in the future. *State ex rel. Florida Bank & Trust Co. v. White*, 155 Fla. 591, 21 So.2d 213 (1945).

Therefore, Appellants' assertion that the instant federal question was actually decided is merely speculation.

The Final Judgment and Decree Rests on Adequate Non-federal Grounds.

All that was adjudged in the Final Judgment was that Appellee Coconut Creek Cable T.V., Inc. may enter the front gate of Wynmoor Village and solicit customers and survey the "lay of the land" to determine where to place its cable. The Final Judgment expressly rests on *both* the Statute and the municipal franchise. The franchise alone, therefore, is adequate basis for the actual judgment.

There was no constitutional ruling for the appellate court to review, of course. The Final Judgment and Decree expressly did not reach the various constitutional issues, except to find that the Statute, on its face and as applied, has not resulted in a taking of Appellants' property. A mere threat or possibility does not rise to the level of an actual taking entitling even an undisputed property owner to just compensation. *Dade County v. Still*, 377 So.2d 689 (Fla. 1979); *City of Miami v. Romer*, 73 So.2d 285 (Fla. 1954).

Therefore, since the highest court of the state delivered no opinion, and it appears that the judgment might have rested on a non-federal ground, this Court lacks jurisdiction to review the affirmance of the Final Judgment and Decree. *Stembridge v. Georgia*, 343 U.S. 541 (1952); *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961); *see, Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

Appellants Lack Standing to Raise the Asserted Constitutional Issue.

The Final Judgment and Decree found no taking has occurred. Apellants have neither sustained, nor are in immediate danger of sustaining, any taking of their property. Indeed, if Appellant/ Developer honors the Agreement for Use and Conveyance, then by 1984 it will not even have legal title to the gatehouse and roadways. The Final Judgment and Decree expressly holds that Appellants failed to demonstrate proper standing. This ruling is supported by the findings in the Final Judgment that there was nothing before the Court to show that the roadways at issue would ever be used by Appellee Coconut Creek Cable T.V., Inc., and that the issue, "indeed, may not, as a practical matter, ever present an actual problem". *App.* 10.

Therefore, this appeal should be dismissed as Appellants lack standing to raise the federal question. *Cramp v. Board of Public Instruction of Orange County, Florida, supra; Commonwealth of Massachusetts, v. Mellon*, 262 U.S. 447 (1923); *see, Tileston v. Ullman*, 318 U.S. 44 (1943).

Insofar As The Asserted Federal Question Is Concerned, The Decision Is Not Final.

By the terms of the Final Judgment and Decree, Appellants are not precluded from raising their arguments *when and if* Appellee Coconut Creek Cable T.V., Inc. attempts to use any of the roadways for the purpose of laying cable. As it recites,

> Accordingly, by this final decree the court does not rule upon the issue of the availability or non-availability, in whole or in part, to plaintiff of any particular easement or right-of-way within Wynmoor. Such specifics are not now before the court, and indeed, may not, as a practical matter ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the WYNMOOR COMMUNITY COUNCIL. In like manner, the Court by this final decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wynmoor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.

App. 10-11. The actual decree, therefore, provided:

> This Court reserves jurisdiction over this cause and the parties hereto for the purpose of making such determinations and taking such actions as may be judicially appropriate to assure meaningful access between plaintiff and the unit owners of Wynmoor consistent with Sections 718.1232, Florida Statutes, and the terms of this Final Judgment and Decree.

App. 13.

The Final Judgment and Decree, even if construed to authorize in the abstract the use of the arterial roadways for the laying of cable, finds that no actual use of the roads has yet occurred, and reserves jurisdiction for consideration of those issues when and if they arise. Thus, even if Appellants' argument that a "taking" has occurred is accepted, it is clear that the issue of just compensation for that taking has not been dealt with. In such a case, the decision is not final, because

> The federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem.

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 634 (1981); *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). Clearly, the contemplated further proceedings on both the factual issue of a taking which has not yet occurred, and on the question of compensation, makes this judgment non-final for the purposes of this Court's jurisdiction. *San Diego Gas & Electric Co., supra.*

The Final Judgment and Decree does not decide anything which is conclusive of the outcome of the further proceedings which are contemplated. While it determines that the unit owners are entitled to be serviced by Appellee Coconut Creek Cable T.V., Inc., its refusal to reach the specific constitutional issue clearly leaves the issue open for full consideration. Certainly, should one of the roadways be actually utilized,

the outcome of further proceedings on the taking question is not preordained. Instead, the issue expressly survives, and will be open for review should Appellants not be satisfied with the result.

The refusal to reach the constitutional issue guarantees Appellants' right to raise this issue in the future, should a taking occur. *Id.; Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Therefore, the decision is not reviewable, as it is not a final judgment within the meaning of 28 U.S.C.A. §1257(2).

MOTION TO AFFIRM

Should this Court decide it has jurisdiction to entertain this appeal, summary affirmance is still clearly called for.

As discussed, *supra*, in connection with the Motion to Dismiss, no taking has occurred. There has not even been a temporary invasion of Appellants' property rights, even by allowing representatives of Coconut Creek Cable on the roadways. This is because Appellants' property rights are subject to the rights of the unit owners in the roadways, as found by the Final Judgment and Decree.

Appellants' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, ____ U.S. ____, 102 S.Ct. 3164 (1982) proceeds from a faulty assumption. Wynmoor Village is not the Developer's property, nor is it the

property of its cable television affiliate. Wynmoor Village is a community of condominiums, with certain portions (the arterial roads and front gate) available for the use and benefit of all unit owners. Appellants are correct in stating on page 10 of their Jurisdictional Statement that the issue is a private landowner's right to exclude. The defect in Appellants' reasoning is simple: Appellants are not really the landowners, the unit owners are.

In short, Appellants' property rights are so limited, they lack the standing to question even a potential taking. They are missing a number of "sticks" in the typical fee simple owner's "bundle of rights".

It is undisputed that all of the condominiums, both the units and common elements thereof, are separate parcels of real property. The Developer does not own any of this property once it has sold the units. The only property to which Developer or Council hold legal title is the arterial roadways and gatehouse. That title, however, is subject to encumberances which create significant property rights in the unit owners. The Developer's property rights do not include the ability to exclude Coconut Creek Cable T.V., Inc. from Wynmoor Village, regardless of the existence of Fla. Stat. §718.1232 (1981). The trial court was correct in finding no standing to raise this issue.

From the inception of Wynmoor Village, the roadways existed for the use and benefit of the unit owners to whose property they lead; and, the Developer later committed itself to convey those roadways to the Council, which also exists for the benefit of the unit owners.

Neither the Council, nor the Developer, has the right to deny access to an invitee of a unit owner. Rather than either of the Appellants having property rights which are abrogated by the Statute, they have, instead, misused what powers they do retain over the roads, contrary to the rights they expressly gave the unit owners in those roads. The trial court's finding that the roadways exist for the "use and benefit of the unit owners" is supported by substantial competent evidence, and the trial court did not err in finding no abrogation of property rights has occurred.

Appellants' reliance on *Loretto, supra*, is misplaced. It is Appellees/Intervenors who stand in Mrs. Loretto's shoes. The trial court was eminently correct in noting that there is a difference between a rental apartment building and a condominium. For starters, condominium unit owners are not the Developer's tenants.

Indeed, while Developer retains certain rights in the roadways (for access to areas still under construction and sale), it is conceivable that, by the time any "permanent physical occupation" of the roadways takes place, the Developer will have become obligated to convey legal title to the Council. Certainly, since the unit owners will control the Council in September, 1984, the Developer will not even have the ability to refuse entry to Coconut Creek Cable T.V., Inc., as it has done.

Indeed, all the state courts have been confronted with is a potential physical occupation of land. While the occupation, when and if it occurs, will be permanent, the land being so occupied will not permanently be the complaining record title holder's property. Instead, the

land will be owned by the members of the Council, the very people to whom access is sought.

Accordingly, since the Developer will not be the permanent owner of the roads, it cannot assert an unconstitutional permanent occupation of that property. Further, it is clear that Appellant Council's objections to the potential permanent occupation of the roads was made not on behalf of its members (Appellees/Intervenors) but instead on behalf of the Developer.

The issue is the right to exclude. The problem with Appellants' case is that they do not have the right to exclude Coconut Creek Cable T.V., Inc., even under the common law, by virtue of the provisions of the condominium documents which they themselves drafted.

Appellants' reliance on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) is similarly misplaced. Again, besides lacking standing, Appellants are not fee simple absolute property owners such as the owner of the marina in that case. Again, if there is any analogy to the instant case, it escapes Appellees/Intervenors, as it is the Intervenors who are the property owners here.

The buildings to which any cable television lines will run are owned by the unit owners, not the Appellants. It is the unit owners who own the equivalent of the marina in *Kaiser Aetna, supra*. The Appellants, if an analogy to the cases they rely on is possible, hold title to the equivalent of the sidewalk in front of the *Loretto* apartment building, or some land in the front of the *Kaiser Aetna* harbor, to which the adjacent property owners (the unit owners) must pass in order to gain access to their property.

The rational basis behind the Statute is self-evident, and reinforced by the very existence of this case. This section of the Condominium Act is designed to give residents of condominium units a choice of cable television service, and to prevent developers who decide to also go into the cable television business from denying condominium residents the right to deal with their competition.

This case is a perfect example of the kind of condominium developer abuse the Statute was enacted to prevent. The history of condominium development in Florida is replete with examples of developers abusing and perverting the condominium concept of fee simple ownership, by retaining economic interests of one form or another in the condominiums they have supposedly sold to unit owners. *E.g., Miller v. Granados*, 529 F.2d 393 (5th Cir. 1976); *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied, sub nom Mangurian v. Thompson*, 434 U.S. 859 (1977); *Point East Management Corp. v. Point East One Condominium Corp.*, 282 So.2d 628 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974); *Steinhardt v. Rudolph*, 422 So.2d 884 (Fla. 3d DCA 1982), *rev. denied*, 434 So.2d 889 (Fla. 1983); *Cole v. Angora Enterprises, Inc.*, 403 So.2d 1010 (Fla. 4th DCA 1981), *aff'd with opinion*, ____ So.2d ____, 8 FLW SCO 206 (Fla. 1983). Appellants' assertion of constitutional rights in the gatehouse and roadways, and their attempt to treat the unit owners as their tenants or serfs, presents not a property right deserving of constitutional protection, but rather, a grasping at a few thin strands in the unit owners' bundle of rights.

It is noteworthy that this statute is included as part of the Condominium Act, as opposed to being codified elsewhere in the Florida Statutes. For once, the Legislature has seen an abuse developing, and acted quickly to correct it. While this statute also serves the legitimate police power of eliminating conditions which inhibit the development of cable television, it serves the more important purpose of preserving condominium unit owners' ability to take part in the market place for goods and services without the handicap of perpetual (or in this case, 20-year) restraints imposed by the Developer.

Accordingly, should this Court decide to take jurisdiction of this appeal, it should summarily affirm the decisions below.

CONCLUSION

Based on the foregoing, the instant appeal should be dismissed for lack of jurisdiction. Alternatively, the decisions of the state courts should be summarily affirmed.

Respectfully submitted,

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Mark B. Schorr

BY _____
MARK B. SCHORR

Appendix

PORTIONS OF FLORIDA STATUTES

CHAPTER 718

CONDOMINIUMS

PART I GENERAL PROVISIONS (ss. 718.101-718.126)

PART II RIGHTS AND OBLIGATIONS OF DEVELOPERS (ss. 718.201-718.203)

PART III RIGHTS AND OBLIGATIONS OF ASSOCIATION (ss. 718.301-718.304)

PART IV SPECIAL TYPES OF CONDOMINIUMS (ss. 718.401-718.403)

PART V REGULATION AND DISCLOSURE PRIOR TO SALE OF RESIDENTIAL CONDOMINIUMS (ss. 718.501-718.509)

PART VI CONVERSIONS TO CONDOMINIUM (ss. 718.604-718.622)

s. 718.101 Short title. This chapter shall be known and may be cited as the "Condominium Act."

s. 718.102 Purposes. The purpose of this chapter is:

(1) To give statutory recognition to the condominium form of ownership of real property.

(2) To establish procedures for the creation, sale, and operation of condominiums. Every condominium created and existing in this state shall be subject to the provisions of this chapter.

s. 718.103 Definitions. As used in this chapter:

. . .

(2) "Association" means the corporate entity responsible for the operation of a condominium.

. . .

(6) "Common elements" means the portions of the condominium property not included in the units.

. . .

(9) "Condominium" means that form of ownership of real property which is created pursuant to the provisions of this chapter and which is comprised of units that may

be owned by one or more persons, and there is, appurtenant to each unit, an undivided share in common elements.

10) "Condominium parcel" means a unit, together with the undivided share in the common elements which is appurtenant to the unit.

(11) "Condominium property" means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

(12) "Declaration" or "declaration of condominium" means the instrument or instruments by which a condominium is created, as they are from time to time amended.

. . .

(16) "Unit" means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration.

. . .

s. 718.104 Creation of condominiums; contents of declaration. Every condominium created in Florida shall be created pursuant to this chapter.

(1) A condominium may be created on land owned in fee simple or held under a lease complying with the provisions of s. 718.401.

(2) A condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with requirements for a deed. All persons having record title to the interest in the land being submitted to condominium ownership, or

their lawfully authorized agents, must join in the execution of the declaration.

. . .

(4) The declaration must contain or provide for the following matters:

(a) A statement submitting the property to condominium ownership.

(b) The name by which the condominium property is to be identified, which shall include the word "condominium" or be followed by the words "a condominium."

(c) The legal description of the land and, if a leasehold estate is submitted to condominium, an identification of the lease.

(d) An identification of each unit by letter, name, or number, or combination thereof, so that no unit bears the same designation as any other unit.

(e) A survey of the land and a graphic description of the improvements in which units are located and a plot plan thereof that, together with the declaration, are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions....

. . .

(h) The name of the association, which must be a corporation for profit or a corporation not for profit.

. . .

(j) The document or documents creating the association, which may be attached as an exhibit.

(k) A copy of the bylaws, which may be attached as an exhibit. Defects or omissions in the bylaws shall not affect the validity of the condominium or title to the condominium parcels.

(l) Other desired provisions not inconsistent with this chapter.

(m) The creation of a nonexclusive easement for ingress and egress over streets, walks, and other rights-of-way serving the units of a condominium, as part of the common elements necessary to provide reasonable access to the public ways, or a dedication of the streets, walks, and other rights-of-way to the public.

. . .

(5) The declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property. However, the rule against perpetuities shall not defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer

of units.

(6) A person who joins in, or consents to the execution of, a declaration subjects his interest in the condominium property to the provisions of the declaration.

(7) All provisions of the declaration are enforceable equitable servitudes, run with the land, and are effective until the condominium is terminated.

. . .

s. 718.106 Condominium parcels; appurtenances; possession and enjoyment.

(1) A condominium parcel created by the declaration is a separate parcel of real property, even though the condominium is created on a leasehold.

(2) There shall pass with a unit, as appurtenances thereto:

(a) An undivided share in the common elements and common surplus.

(b) The exclusive right to use such portion of the common elements as may be provided by the declaration.

(c) An exclusive easement for the use of the airspace occupied by the unit as it exists at any particular time and as the unit may lawfully be altered or reconstructed from time to time. An easement in airspace which is vacated shall be terminated automatically.

(d) Other appurtenances as may be provided in the declaration.

(3) A unit owner is entitled to the exclusive possession of his unit, subject to the provisions of s. 718.111(5). He shall be entitled to use the common elements in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the lawful rights of other unit owners.

. . .

s. 718.111 The association.

(1) The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit. However, any association which was in existence on January 1, 1977, need not be incorporated. The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners. An association may operate more than one condominium.

(2) The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property.

. . .

(3) A unit owner does not have any authority to act for the association by reason of being a unit owner.

(4) The powers and duties of the association include those set forth in this section and those set forth in the declaration and bylaws, if not inconsistent with this chapter.

. . .

AGREEMENT FOR USE AND CONVEYANCE

This Agreement entered into the 16th day of September, 1974, between ROSSMOOR FLORIDA LIMITED PARTNERSHIP, a New York Limited Partnership, qualified to do business in the State of Florida, hereinafter called the "Developer" and ROSSMOOR COCONUT CREEK COMMUNITY COUNCIL, INC., a corporation not for profit under the laws of the State of Florida, hereinafter called the "Council";

W I T N E S S E T H:

1. Upon the terms and conditions herein set forth and in consideration of Council's agreement to maintain, repair, insure, pay for taxes and to otherwise bear all expenses of the management, operation, use and Developer's ownership of the properties covered by this Agreement, and in consideration of the prompt and continuous performance by the Council of each and every of its

covenants and agreements herein made to be kept, the Developer hereby agrees to permit the Council, its members and their guests and invitees the non-exclusive and regular use of the properties which from time to time are brought under the provisions of this Agreement as hereinafter provided.

. . .

3. Community Council Properties. The Council is a non-profit corporation formed pursuant to laws of the State of Florida for the purpose of operating and managing the community and recreational facilities for members of the Council. The Council has entered into this Agreement to make available the Community Council Properties for the recreation, leisure time activity, health, use, benefit and enjoyment of the members of the Council

during the term of this Agreement.

. . .

c. Each Unit Owner shall have the right to use, occupy and enjoy the Community Council Properties through this Agreement, subject to all of the provisions of this Agreement, the Articles of Incorporation and the By-Laws of the Council, and such rules and regulations which the Council may from time to time adopt.

d. Use of the Community Council Properties shall be subject to all laws, statutes, ordinances, rules and regulations of all appropriate governmental authorities, and to the rules and regulations of the National Board of Fire Underwriters, or in the event it shall terminate its present functions, then of any other body exercising similar functions.

. . .

22. Developer's Right to Change and Modify Schedule "A". Developer retains the right in its sole and absolute discretion, throughout the term of this Agreement or any extension thereof to add to, subtract from or change the boundries of, the lands described in Schedule "A", excepting only as to properties which are improved or constructed or are being improved or constructed as of the date of this Agreement. Such change or modification shall be effective upon Developer's giving written notice of same to the Council.

ARTICLES OF INCORPORATION

OF

ROSSMOOR COCONUT CREEK COMMUNITY COUNCIL, INC.

The undersigned do hereby associate themselves for the purpose of forming a corporation not for profit. Pursuant to the provisions and laws of the State of Florida, we certify as follows:

. . .

2. PURPOSE

The purpose for which the Council is organized is to provide an entity for the operation of The Community Council Properties as defined in the Declaration of Condominiums within the Development set forth in Exhibit "G" attached to and made a part of the Declaration of Condominium of ROSSMOOR BAHAMA VILLAGE, a condominium, and pursuant to the provisions of the

Condominium Act.

3. POWERS

The powers of the Council shall include and be governed by the following provisions:

. . .

3.3 All funds and the titles to all properties acquired by the Council, and their proceeds, shall be held in trust for the members in accordance with the provisions of the Declaration of Condominium, these Articles of Incorporation, and the By-Laws of the Council.

3.4 The powers of the Council shall be subject to and shall be exercised in accordance with the provisions of the Declaration of Condominium and the By-Laws of the Council.

4. MEMBERSHIP

4.1 The membership of the Council shall be Directors comprising one (1)

representative from the Board of Directors of each Association formed to govern each Condominium in the total Development pursuant to Exhibit "G" attached hereto and as may be modified from time to time by ROSSMOOR FLORIDA LIMITED PARTNERSHIP, hereinafter referred to as "Developer". The record Owners of all Units in each Condominium comprising the Development shall be non-voting members for the purpose of enjoyment of all facilities located on the Community Council Properties.

. . .

8. DIRECTORS

. . .

H. In the event that Developer still has the right to elect a majority of the Directors in accordance with the above provisions after ten (10) years of the recording of the Declaration of

Rossmoor Bahama Village, Developer shall thereupon agree to election of Directors as hereinafter set forth in Paragraph 8.3. Further, Developer shall have the right to terminate its right to elect a majority of the Directors at any time.

. . .

8.3 At such time as Developer has closed the sales of all the units in the various condominiums comprising the Development, or upon the date ten (10) years hence from the recording of the Declaration of Condominium of Rossmoor Bahama Village, or upon the Developer's voluntary termination of its right to elect a majority of the Directors, whichever comes first, the Directors of the Council shall constitute one (1) member of the Board of Directors of each of the constituent Associations within the Development.

DECLARATION OF CONDOMINIUM

OF

_____ CONDOMINIUM

WYNMOOR LIMITED PARTNERSHIP, a New York Limited Partnership, authorized to do business in Florida, being the owner of record of the fee simple title to the real property situate, lying and being in Broward County, Florida, as more particularly described in the Survey Exhibit attached hereto as EXHIBIT 1, which is incorporated herein by reference, does hereby state and declare that said realty, together with improvements thereon, is submitted to condominium ownership pursuant to the CONDOMINIUM ACT of the State of Florida (F.S. 718, et. seq.) and does hereby file this DECLARATION OF CONDOMINIUM.

. . .

3. DEFINITION OF TERMS. The terms used in this DECLARATION and the EXHIBITS attached hereto shall have the meanings stated in the CONDOMINIUM ACT. (Sec. 718.101, Fla. Stat., 1977) and as follows, unless the context otherwise requires.

. . .

3.19 "SPONSOR" means WYNMOOR LIMITED PARTNERSHIP, a New York Limited Partnership authorized to do business in Florida, its successors and assigns, who have created this CONDOMINIUM.

. . .

3.23 "COUNCIL" means and refers to WYNMOOR COMMUNITY COUNCIL, INC.

3.24 "COUNCIL PROPERTIES" means and refers to all properties conveyed to, or to be conveyed to, the COUNCIL including but not limited to recreational facilities and community services and facilities,

including "COMMUNITY SERVICES AND FACILITIES."

. . .

3.26 "COMMUNITY SERVICES AND FACILITIES" means those areas and the improvements thereon which the SPONSOR or ASSOCIATION so designates and either conveys to the COUNCIL or designates the responsibility for the maintenance or operation thereof to the COUNCIL. It is the intention of this definition to include therein certain facilities supplied for the benefit of the residents of that certain development known as WYNMOOR VILLAGE, Coconut Creek, Florida, which may include, for the purpose of illustration, but not be limited to, the providing of a security system, internal and external transportation system, maintenance of main roads, drainage and lake systems, lighting systems, swales, sales, entrance ways and providing certain utility services

within the development.

. . .

6. EASEMENTS.

. . .

6.6 ACCESS. SPONSOR and COUNCIL covenant to provide, either by way of perpetual private easements or publicly dedicated right of way, access to the CONDOMINIUM for ingress and egress to one of the major entrances and exits to WYNMOOR VILLAGE, Coconut Creek, Florida.

. . .

18. TRANSFER OF COUNCIL PROPERTIES TO COUNCIL. It is understood and agreed that the COUNCIL PROPERTIES will be transferred from the SPONSOR by the COUNCIL for the benefit of this and all other CONDOMINIUM ASSOCIATIONS now or to be located in WYNMOOR VILLAGE and for the benefit of all UNIT OWNER members of the ASSOCIATION and COUNCIL,

all pursuant to the provisions of the COUNCIL DOCUMENTS and any amendments thereto and revisions thereof as agreed upon between the COUNCIL, SPONSOR and if the same materially affect this ASSOCIATION then by this ASSOCIATION.

. . .

PORTIONS OF FLORIDA

OFFERING CIRCULAR FOR

MARTINIQUE II-C CONDOMINIUM

. . .

(e.11) There are land and facilities for use by UNIT OWNERS which are or will be owned by WYNMOOR COMMUNITY COUNCIL, INC., which are provided for the use of the UNIT OWNERS under the terms and conditions of the COUNCIL DOCUMENTS. The facilities to be provided thereunder are those items designated in the discretion of the COUNCIL to serve the WYNMOOR VILLAGE community as a whole and may include, but not be limited to:

. . .

(3) Roadways and Lighting Systems thereon.

(4) Security Services

. . .

(e.19) Description of Council Facilities (COUNCIL PROPERTIES):

A. In accordance with the COUNCIL PROPERTIES - Club Concept described in Paragraph (e.11) of this Offering Circular there are recreational and other commonly used facilities that will be used in common with other condominiums and their members and which require the payment of maintenance and expenses by UNIT OWNERS.

B. The facilities are described as follows:

. . .

(10) Road and Lighting Systems: Private internal roads and lighting systems for such roadways.

(11) Security System: 24-hour manned gatehouse and one 24-hour mobile road patrol covering the project in its entirety. The primary responsibility of such system

is guardhouse clearance and contacting the appropriate law enforcement authorities as the need arises.

C. Statement of Ownership. The facilities set forth above are currently owned by the SPONSOR and operated by the COUNCIL under the provisions of the COUNCIL DOCUMENTS (EXHIBIT 3 to this Offering Circular). However, such facilities are committed, as set forth therein, to be conveyed at various times by the SPONSOR to the COUNCIL. The COUNCIL has the power to add to, diminish, alter and otherwise modify the COUNCIL PROPERTIES and services offered by the COUNCIL as the COUNCIL deems appropriate. For a certain period of time the SPONSOR or people affiliated with the SPONSOR have the majority of voting rights of the governing board of

the COUNCIL. Thereafter, the COUNCIL will be controlled by the members . . .